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WILCOX & CO

No. 6429

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Appellants,

vs.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6429

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Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. J. A. ADAMS, Mr. SAM M. DRIVER, Commercial Bank Bldg., Wenatchee, Washington,
Attorneys for Complainant and Appellee.

Messrs. BERKEY & COWAN, 204–6 Wall St., Bank Bldg., Spokane, Washington,
Attorneys for Respondents and Appellants.

[1*]

In the Superior Court of the State of Washington, in and for the County of Chelan.

No. 8791.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Respondents.

NOTICE.

The State of Washington, to Margaret Rosborough and Alice Barbee Wick, Respondents:

YOU AND EACH OF YOU ARE HEREBY NOTIFIED That the petitioner, Chelan County, Washington, a municipal corporation, has filed in

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*Page-number appearing at the foot of page of original certified Transcript of Record.

the above-entitled court, with the Clerk thereof, a petition showing that the Board of County Commissioners of Chelan County has entered an order declaring the construction of a public highway along the south shore of Lake Chelan from a point in the interior of Lot 3, Section 3, Township 27 N., R. 21 E., W. M., at survey station 420 plus 96.5 of South Lake Shore Road as established and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9, an interior point in the SW.¼ NE.¼ of Section 4, Township 27 N., R. 21 E., W. M., being a point of intersection with the Twenty-five Mile Creek Road, to be a public necessity and has laid out and established the said highway in accordance with provisions of Chapter 173, Session Laws of Washington, 1925; and has ordered the Prosecuting Attorney of Chelan County to proceed under the power of eminent domain to acquire such lands and other property and property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use; and in order to construct the said highway upon the route laid out and established by the said Board of County Commissioners, it is necessary for the petitioner to acquire a right of way for highway purposes over and across [2] lands and premises owned by respondents and more particularly described as follows, to wit:

> A road right of way 60 feet in width over and across Lots 1, 2, and 3 of Section 3, T. 27

N., R. 21 E., W. M., and Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., excepting however that part of said right of way that overlaps the SW.¼ of the SW.¼ of said Section 3, all being more particularly described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the north boundary line of said Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line. From the initial point, as hereinabove described, run thence S. 35° 11′ E., 76.6 feet; thence on a 6° curve to the left, having a central angle of 19° 29′ a distance of 324.7 feet; thence S. 54° 40′ E., 442.7 feet; thence on a 10° curve to the left, having a central angle of 30° 27′, a distance of 304.5 feet; thence S. 85° 07′ E., 156.1 feet; thence on 12° curve to the right, having a central angle of 33° 35′, a distance of 279.9 feet; thence S. 51° 32′ E., 75.1 feet; thence on a 12° curve to the left, having a central angle of 34° 16′, a distance of 285.5 feet; thence S. 85° 48′ E., 61.5 feet; thence on an 8° curve to the right, having a central angle of 36° 58′, a distance of 462.1 feet; thence

S. 48° 50′ E., 290.3 feet; thence on a 6° curve to the left, having a central angle of 47° 01′, a distance of 293.9 feet; thence N. 84° 09′ E., 326.6 feet; thence on a 4° curve to the right, having a central angle of 37° 33′, a distance of 938.8 feet; thence S. 58° 18′ E., 656.2 feet; thence on a 6° curve to the left, having a central angle of 7° 19′, a distance of 121.9 feet; thence S. 65° 37′ E., 215.1 feet; thence on a 21° curve to the left, having a central angle of 33° 41′, a distance of 160.4 feet; thence N. 80° 42′ E., 3.5 feet to an interior point in Lot 3, Section 3, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 7.53 acres more or less according to survey thereof, not including however, that part of said right of way contained within the SW.¼ of the SW.¼ of said Section 3.

The object of said proceeding is to ascertain and determine the compensation to be made in money to the owner or owners, respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting the lands, real estate and premises above described, in the manner set forth in said petition, and for a release from all liability for all damages to the adjoining lands of the respondent not taken, in any manner arising from the taking of [3] the above-described property and the construction of a public highway thereon, and to obtain a decree that the contemplated use for which said lands, real estate, premises and other property are sought to be appropri-

ated is a public object and use and that the public interest requires the laying out, establishment and construction of said highway, and that said lands, real estate, premises and other property sought to be appropriated and injuriously affected are required and necessary for the laying out, establishment and construction of said highway.

NOTICE IS FURTHER GIVEN, that on the 30th day of January, 1929, at the hour of 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the petitioner will present said petition and proof in support thereof to said Superior Court in the courthouse at Wenatchee, Washington, for hearing and determination and for the fixing of a time at which a jury shall be called to determine the amount of compensation to be made and the parties to whom the same shall be paid.

Dated this 5th day of January, 1929.

CHELAN COUNTY, WASHINGTON,
Petitioner.
By J. A. ADAMS,
Prosecuting Attorney.

Office and Postoffice Address:
Commercial Bank Building,
Wenatchee, Chelan County, Washington.

Filed Jan. 5, 1929. [4]

In the Superior Court of the State of Washington, in and for the County of Chelan.

No. 8791.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Respondents.

PETITION.

To the Honorable Superior Court of the State of Washington in and for Chelan County, and to the Judge Thereof:

The petitioner alleges:

I.

That at all times herein mentioned the petitioner, Chelan County, Washington, was and now is a duly constituted, organized and existing county and legal subdivision of the State of Washington.

II.

On the 30th day of October, 1928, the Board of County Commissioners of Chelan County, Washington, by unanimous vote, passed a resolution and caused the same to be entered upon the minutes of said Board, declaring that the laying out and establishment of a county road along the south shore of Lake Chelan from a point in the interior of Lot 3,

Section 3, Township 27 N., R. 21 E., W. M., at survey station 420 plus 96.5 of South Lake Shore Road as established and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9 an interior point in the SW.¼ NE.¼ of Section 4, Township 27 N., R. 21 E., W. M., being a point of intersection with the Twenty-five Mile Creek Road, to br a public necessity and declaring the intention of said Board to lay out and establish said road and directing the County Engineer to report upon said project, all in accordance with Chapter 173, Session Laws of Washington, 1925. [5]

III.

Thereupon the County Engineer made an examination of said proposed road and a survey thereof, and made a report to said Board in writing, as required by law, in which report the County Engineer found, among other things, said proposed road to be practicable and the construction thereof to be a public necessity, and filed with said report a map of the proposed road, as required by law, together with his field-notes and profiles of such survey. And thereafter and on the 30th day of October, 1928, the Board of County Commissioners of Chelan County set the matter of the laying out and establishment of said road and the report of the County Engineer thereon, for hearing on November 23, 1928, at the office of the Board of County Commissioners in the courthouse at Wenatchee, Washington, and caused notice of said hearing to be posted

and published in the form and for the length of time provided by law.

IV.

On the said 23d day of November, 1928, a public hearing on the laying out and establishment of said road and upon the report of the County Engineer thereon was held by said Board of County Commissioners, and the said Board made and entered its order finding said road to be a public necessity and establishing the said road as a public highway, on the route designated and described in the report of the said County Engineer. It was and is further provided by said order of the Board of County Commissioners on November 23, 1928, that the Prosecuting Attorney for Chelan County be and he is thereby directed to proceed under the power of eminent domain to acquire such lands and other property or property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use, and commence and prosecute to a conclusion condemnation suits for the acquisition of property and rights of way for said new highway as so laid out and established. [6]

V.

Petitioner has been unable to agree with the respondent for the purchase of the right of way hereinafter described, and in order to construct the said highway upon the route laid out and established by the said Board of County Commissioners, it is necessary for the petitioner to acquire a right

of way for highway purposes more particularly described as follows, to wit:

[See pages 2, 3 for description.]

VI.

That the object for which this proceeding is brought is to ascertain and determine the compensation to be made in money, to the owner or owners, respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting the [7] lands, real estate, premises and other property above described in the manner above set forth, and for a release from all liability for all damages to the adjoining lands of the respondents not taken, in any manner arising from the taking of the above-described property and the construction of a public highway thereon.

VII.

The object for which said lands, real estate, premises and other property are sought to be appropriated, acquired and injuriously affected by your petitioner is a public object and use, and that the public interest requires the construction of the said highway upon the above-described right of way, and the said lands, real estate, premises and other property sought to be appropriated and injuriously affected are required and necessary for the laying out, establishment and construction of said highway.

VIII.

The following are the names of each and every owner, encumbrancer and person or party inter-

ested in the above-described property, or any part thereof, so far as the same can be ascertained from the public records or otherwise, namely, Margaret Rosborough and Alice Barbee Wick.

IX.

In order to acquire title to said property above described it is necessary for your petitioner to condemn said property and to acquire the same for the public purposes aforesaid by appropriate proceedings under and by virtue of the power of eminent domain conferred upon your petitioner in common with other like corporations in and by the laws of the State of Washington, and your petitioner makes this petition for said purposes.

WHEREFORE, your petitioner prays that after due notice given according to law, it may be adjudged and decreed by this court that [8] the contemplated use for which the above-described land, real estate, premises and other property are sought to be appropriated is really a public object and use, and that the public interest requires the laying out, establishment and construction of said highway, and that said land, real estate premises and other property are required and necessary for the laying out, establishment and construction of said highway; that a jury be impaneled to ascertain the compensation to be made in money to the above-named owners of said land, for the taking and injuriously affecting the same, or in case a jury be waived, then that the compensation to be made as aforesaid be ascertained and determined by the court or judge thereof, and that the court apportion

the damages so found among the persons entitled thereto; and that a judgment or decree be entered when said compensation shall have been determined to the effect that upon payment thereof by the petitioner full title to said property shall be at once vested in the petitioner for the uses set forth therein, and for such other relief as may be proper in the premises.

Dated this 5th day of January, 1929.

CHELAN COUNTY, WASHINGTON,
Petitioner,
By J. A. ADAMS,
Prosecuting Attorney. [9]

State of Washington,
County of Chelan,—ss.

John Godfrey, being first duly sworn, on oath deposes and says: That he is the duly elected, qualified and acting County Auditor of Chelan County, Washington, and *ex-officio* Clerk of the Board of County Commissioners of said county, and as such officer makes this verification for and on behalf of the petitioner herein; that he has read the foregoing petition, knows the contents thereof and believes the same to be true.

JOHN GODFREY.

Subscribed and sworn to before me this 5th day of January, 1929.

[Superior Court Seal]

L. T. ARMSTRONG,
Clerk of the Superior Court.

Filed Jan. 5, 1929. [10]

[Title of Court and Cause—No. 8791.]

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of Chelan,—ss.

S. M. Driver, being first duly sworn on oath, deposes and says: That he is deputy prosecuting attorney for Chelan County, Washington, a municipal corporation, petitioner in the above-entitled cause, and one of the attorneys for said petitioner; that he makes this affidavit for and on petitioner's behalf as a basis for the publication of notice to the respondents Margaret Rosborough and Alice Barbee Wick.

That the said Margaret Rosborough and Alice Barbee Wick, respondents above named, and each of them, is a person claiming an interest in the real property described in the petition and sought to be condemned by the petitioner herein; and that the said Margaret Rosborough is a nonresident of the State of Washington. Affiant is informed and believes that said Margaret Rosborough is a resident of the city of Abington, Montgomery County, in the state of Pennsylvania, and that her last known address is and was "Post Office Box 183, Abington, Montgomery County, Pennsylvania." That on the 4th day of January, 1929, affiant deposited in the postoffice at Wenatchee, Washington, with postage fully prepaid, addressed to said Margaret Rosborough at the address above given, a true and correct copy of the notice and petition in the above-entitled cause. [11]

That the said Alice Barbee Wick, respondent above named, is a nonresident of the State of Washington. Affiant is informed and believes that said Alice Barbee Wick is a resident of the city of Philadelphia, in the State of Pennsylvania, and that her last known address is and was "Care of Mr. Joseph B. Thomas, Suite 27, Transportation Building, 26 South 15th Street, Philadelphia, Pennsylvania." That on the 4th day of January, 1929, affiant deposited in the postoffice at Wenatchee, Washington, with postage fully prepaid, addressed to said Alice Barbee Wick at the address above given, a true and correct copy of the notice and petition in the above-entitled cause.

S. M. DRIVER.

Subscribed and sworn to before me this 5th day of January, 1929.

J. A. ADAMS,
Notary Public in and for the State of Washington,
Residing at Wenatchee.

Filed Jan. 5, 1929. [12]

[Title of Court and Cause—No. 8791.]

NOTICE AND PETITION FOR BOND FOR REMOVAL.

To the Above-named Petitioner and to J. A. Adams, Your Attorney:

You and each of you will please take notice that Margaret Rosborough and Alice Barbee Wick, the above-named respondents, appearing herein especi-

ally for the purpose only of removing the above-entitled case to the District Court of the United States, Eastern District of Washington, Northern Division, will, on Wednesday, the 30th day of January, 1929, at the hour of 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard in the above-entitled court, present petition and bond herein as required by law for the removal of said case from the above-entitled court to the District Court of the United States, Eastern District of Washington, Northern Division. Said bond in the sum of $500.00 given on such removal, and copies of such petition and bond are herewith served upon you, and after the filing of said petition and bond, to wit, 9:30 in the forenoon of the 30th day of January, 1929, or as soon thereafter as counsel can be heard, said respondents will present and call to the attention of said Superior Court of the State of Washington, for Chelan County, at the courthouse of said Chelan County, at Wenatchee, Washington, the said petition and bond, and move said court to accept said petition and bond and [13] approve said bond, and for an order removing said cause from the above-entitled court to said District Court of the United States, Eastern District of Washington, Northern Division. Said motion for removal is to be on the ground stated in said petition and bond, said petition and bond so filed and presented, and on all the files and records in said case.

J. D. CAMPBELL,

Attorney for Said Respondents, Appearing Specially as Aforesaid.

Copy of the foregoing notice of bond and petition in the above-entitled case received this —— day of January, 1929.

_____,

Attorney for Petitioner.

Filed Jan. 5, 1929. [14]

[Title of Court and Cause—No. 8791.]

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

I.

Your petitioners, Margaret Rosborough and Alice Barbee Wick, respondents above named, appearing specially for the purpose only of removing the above-entitled case to the District Court of the United States, Eastern District of Washington, Northern Division, respectfully shows to this Honorable Court that said petitioners and each of them are respondents in said suit, which is a civil suit in its nature, and that the matter now in dispute in said cause exceeds the sum of $3,000.00 to said petitioners and each of them, exclusive of interest and costs.

II.

Your petitioner shows to this Honorable Court that there is in said suit a separable controversy which is wholly between citizens of different states. That said petitioners and each of them were at the

time of bringing said suit, ever since have been, and still are citizens and residents of the State of Pennsylvania, and that said petitioners and each of them are not now and never have been residents of the State of Washington, and that said Chelan County is a resident of the State of Washington and a municipal corporation of the State of Washington. [15]

III.

That said controversy is of the following nature, viz.: A petition for the purpose, as alleged therein, of establishing a county road along the south shore of Lake Chelan from a point in the interior of lot 3, Section 3, Township 27 N. of Range 21 E., W. M., at survey station 420 plus 96.5 of South Lake Shore Road as established and of record, and running thence in a general northwestely direction a distance of approximately 1.3 miles to survey station 488 plus 00.9 an interior point in the SW.¼ of NE.¼ of Section 4, Township 27 North of Range 21 E., W. M., being the point of intersection with the Twenty-five Mile Creek Road, and declaring the same to be a public necessity and declaring the intention of said board to lay out and establish said road and directing the County Engineer to report upon said project in accordance with Chapter 173 Session Laws of Washington of 1925. Said petitioner in said proceeding is attempting to acquire right of way for highway purposes more particularly described as follows:

> A road right of way 60 feet in width over and across lots 1, 2, and 3 of Section 3, Tp. 27,

N. of R. 21, E., W. M., and lot 6 of Section 4, Tp. 27 N. of R. 21 E., W. M., excepting however, that part of said right of way that overlaps the SW.¼ of the SW.¼ of said Section 3, all being more particularly described as follows, to wit:

Tying to the section corner common to sections 3, 4, 9 and 10, Tp. 27 N., R. 21 E., W. M., and run thence north 0° 44′ east following the section line between said sections 3 and 4 a distance of 1976.6 feet; thence north 85° 07′ west 351.3 feet; thence north 54° 40′ west 762.7 feet; thence north 35° 11′ west 240.6 feet more or less to the north boundary line of said lot 6 of section 4, Tp. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line: From the initial point, as hereinabove described, run thence south 35° 11′ east 76.6 feet; thence on a 6° curve to the left, having a central angle of 19° 29′ a distance of 324.7 feet; thence south 54° 40′ east 442.7 feet; thence on a 10° curve to the left, having a central angle of 30° 27′ a distance of 304.5 feet; thence south 85° 07′ east 156.1 feet; thence on a 12° curve to the right, having a central angle of 33° 35′, a distance of 279.9 feet; thence south 51° 32′ east 75.1 feet; thence on a 12° curve to the left, having a central angle of 34° 16′ a distance of 285.5 feet; thence south 85° 48′ east 61.5 feet; thence on a 8° curve to the right, having a cen-

tral angle of 36° 58′ a distance of 462.1 feet; thence south 48° 50′ east 290.3 feet; thence on a 6° curve to the left, having a central angle of 47° 01′ a distance of 293.9 feet; thence north 84° 09′ east 326.6 feet; thence on a 4° curve to the right, having a central angle of 37° 33′ a distance of 938.8 feet; thence south 58° 18′ east 656.2 feet; thence on a 6° curve to the left, having a central angle of 7° 19′ a distance of 121.9 feet; thence south 65° 37′ [16] east 215.1 feet; thence on a 21° curve to the left, having a central angle of 33° 41′ a distance of 160.4 feet; thence north 80° 42′ east 3.5 feet; to an interior point in lot 3, section 3, Tp. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 7.53 acres more or less according to survey thereof, not including, however, that part of said right of way contained within the SW.¼ of SW.¼ of said Sec. 3.

IV.

It is further claimed in said petition that the object for which said action is brought is to ascertain and determine the compensation to be paid in money to the owner or owners respectively and to all tenants, encumbrancers and others interested in the taking or injuriously affecting the lands, real estate, premises and other property above described in the manner above set forth, and for the release from all liability for damages to the adjoining lands of respondents not taken, in any manner arising from the taking of the above-de-

scribed property and the construction of a public highway thereon.

V.

It is further claimed in said petition that the object for which said lands, real estate, premises and other property are sought to be appropriated, acquired and injuriously affected by said petitioner is a public object and use, and that the public interest requires the construction of said highway upon the above-described right of way, and the said lands, real estate, premises and other property sought to be appropriated and injuriously affected are required and necessary for the laying out, establishment and construction of said highway.

VI.

That the respondents herein are the persons and the only persons alleged to be interested in the above-described property or any part thereof.

VII.

It is further alleged in said petition that in order to acquire title to said property above described it is necessary for said petitioner [17] to condemn said property and to acquire same for the public purpose aforesaid by appropriate proceedings under and by virtue of the power of eminent domain conferred upon said petitioner in common with other like corporations in and by the laws of the State of Washington.

VIII.

That your petitioners desire to remove said case to the United States District Court, Eastern Dis-

trict of Washington, Northern Division, and your petitioners file herein a bond in the sum of $500.00 with good and sufficient surety for said respondents and each of them entering said District Court of the United States, Eastern District of Washington, Northern Division, within thirty days from the date of filing the petition, a certified copy of the records in said cause and for paying all costs that may be awarded by said District Court if it shall hold that said suit was improperly or wrongfully removed thereto.

WHEREFORE your petitioners pray that this Honorable Court proceed no further herein except to accept this petition and said bond as required by law, and to order said case to be removed to the District Court of the United States, Eastern District of Washington, Northern Division, and to order a transcript of the record made and filed in the District Court as provided by law, and to stay all further proceedings.

J. D. CAMPBELL,

Attorneys for Petitioners Herein, Appearing Specially as Aforesaid.

Office and Postoffice Address:

1210 Old National Bank Bldg.,

Spokane, Washington. [18]

State of Washington,

County of Spokane,—ss.

J. D. Campbell, being first duly sworn, on oath states that he is one of the attorneys for petitioners, Margaret Rosborough and Alice Barbee Wick, respondents in the above-entitled case, and makes

this verification on behalf of said petitioners and respondents. That he has read the foregoing petition, knows the contents thereof, and the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

J. D. CAMPBELL.

Subscribed and sworn to before me this 22d day of January, 1929.

[Notarial Seal] JOSEPH ROSSLOW,
Notary Public in and for the State of Washington,
Residing at Spokane.

Filed Jan. 25, 1929. [19]

[Title of Court and Cause—No. 8791.]

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Margaret Rosborough and Alice Barbee Wick, respondents above, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized to do business in the State of Washington, as surety, are held and firmly bound unto Chelan County, the petitioner in the above-entitled cause, its successors and assigns, in the penal sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, for the payment of which sum, well and truly to be made, the principals

hereby bind themselves, their heirs, administrators, executors, and the said surety company hereby binds itself, its successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22d day of January, A. D. 1929.

Upon condition, nevertheless, that whereas the said respondents Margaret Rosborough and Alice Barbee Wick, simultaneously with the filing of this bond intend to file their petition in the above-entitled suit or proceeding in the above-entitled court, for the removal of such suit or proceeding into the District Court of the United States in the district where such suit or proceeding is pending, to wit: The District Court of the United States in and for the Eastern District of Washington, Northern Division, according to the provisions of the Act of Congress in such case made and provided,—

Now, if the said Margaret Rosborough and Alice Barbee Wick [20] shall within thirty (30) days from the date of filing of said petition for removal, enter into the said District Court of the United States in and for the Eastern District of Washington, Northern Division, a certified copy of the record in said suit or proceeding, and shall well and truly pay or cause to be paid all costs that may be awarded by said District Court of the United States in and for the Eastern District of Washington, Northern Division, if said court shall hold that said suit or proceeding was wrongfully or improperly removed thereto, then this obligation shall

be void; otherwise it shall remain in full force and virtue.

MARGARET ROSBOROUGH. [Seal]
ALICE BARBEE WICK. [Seal]
UNITED STATES FIDELITY AND GUARANTY COMPANY.
[Seal] By WILLIS E. MAHONEY,
Attorney-in-fact.

The foregoing bond is hereby approved and accepted this 30 day of January, 1929.

W. O. PARR,
Judge of the Above-entitled Court.

Filed and recorded in Civil Bond Journal Vol. 3, page 360, Jan. 25, 1929. [21]

[Title of Court and Cause—No. 8791.]

AFFIDAVIT OF SERVICE.

State of Washington,
County of Chelan,—ss.

G. H. Strevel, being first duly sworn, upon oath deposes and says that at all times herein mentioned he was and now is a citizen of the United States of America and resident of the State of Washington, over the age of twenty-one years, not a party to the above-entitled action, and competent to be a witness therein; that on the 24th day of January, 1929, he served the annexed notice of petition and bond for removal upon the defendant Margaret Rosborough by delivering to J. A. Adams, as attorney, by

delivering in the hands of and leaving with the said J. A. *Adam as* on the date aforesaid, at his office in Wenatchee, Chelan County, Washington, a full, true and correct copy of the annexed notice of petition and bond for removal.

Signed—G. H. STREVEL.

Subscribed and sworn to before me this 25 day of January, 1929.

[Superior Court Seal]

L. T. ARMSTRONG,
County Clerk.
By C. W. ARMSTRONG,
Dep.

Fee 60
Service .....
Mileage .....

Filed Jan. 25, 1929. [22]

[Title of Court and Cause—No. 8791.]

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of Chelan,—ss.

I, Carrie I. Skinner, being first duly sworn, on oath depose and say: That I am the princip*le* clerk of the World Publishing Co., a corporation organized and existing under the laws of the State of Washington, the owner and publisher of the "Wenatchee Daily World," a legal daily newspaper printed and published at the office of the owner

and publisher thereof in the City of Wenatchee, County of Chelan, and State of Washington, since prior to the year 1910; that I make this affidavit for and on behalf of said corporation; that said newspaper is a newspaper of general circulation in said county and State, and has at all times been and now is printed and published in the English language, and that the notice in the Matter of Chelan County vs. Margaret Rosborough and Alice Barbee Wick, No ...., a printed copy of which is hereunto attached, was published in said newspaper proper and not in supplement form, in the regular and entire edition of said paper once each week for a period of 4 consecutive weeks, beginning on the 7 day of January, 1929, and ending on the 28 day of January, 1929, both dates inclusive, and that said newspaper was regularly distributed to its subscribers during all of said period.

That the full amount of the fee charged for the foregoing [23] publication is the sum of $18.00, which amount has been paid in full.

CARRIE I. SKINNER.

Subscribed and sworn to before me this 30th day of January, 1929.

J. A. ADAMS,
Notary Public in and for the State of Washington,
Residing at Wenatchee, Chelan County.

(Newspaper clipping attached.) [24]

J. A. ADAMS, Commercial Bank Bldg. No.....

Notice.

In the Superior Court of the State of Washington, in and for the County of Chelan.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Respondents.

The State of Washington to Margaret Rosborough and Alice Barbee Wick, Respondents:

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED that the petitioner, Chelan County, Washington, municipal corporation, has filed in the above-entitled court, with the Clerk thereof, a petition showing that the Board of County Commissioners of Chelan County has entered an order declaring the construction of a public highway along the south shore of Lake Chelan from a point in the interior of Lot 3, Section 3, Township 27 N., R. 21 E., W. M., at survey station 420 plus 96.5 of South Lake Shore Road as established and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9, an interior point in the SW.¼ NE.¼ of Section 4, Township 27 N., R. 21 E., W. M., being a point of intersection with the

Twenty-five Mile Creek road, to be a public necessity, and has laid out and established the said highway in accordance with provisions of Chapter 173, Session Laws of Washington, 1925; and has ordered the Prosecuting Attorney of Chelan County to proceed under the power of eminent domain to acquire such lands and other property and property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use; and in order to construct the said highway upon the route laid out and established by the said Board of County Commissioners, it is necessary for the petitioner to acquire a right of way for highway purposes over and across lands and premises owned by respondents and more particularly described as follows, to wit: [25]

A road right of way 60 feet in width over and across Lots 1, 2, and 3, of Section 3, T. 27 N., R. 21 E., W. M., and Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., excepting, however, that part of said right of way that overlaps the SW.¼ of the SW.¼ of said Section 3, all being more particularly described as follows, to wit:

Tying to the section corner common to Section 3, 4, 9, and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0 deg. 44 min. E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85 deg. 07 min. W. 351.3 feet; thence N. 54 deg. 40 min. W. 762.7 feet; thence N. 35 deg. 11 min. W. 240.6 feet, more or less, to the north boundary line of said Lot 6 of Section 4, T.

27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line: From the initial point as hereinabove described, run thence S. 35 deg. 11 min. E. 76.6 feet; thence on a 6 deg. curve to the left, having a central angle of 19 deg. 29 min., a distance of 324.7 feet; thence S. 54 deg. 40 min. E. 442.7 feet; thence on a 10 deg. curve to the left, having a central angle of 30 deg. 27 min., a distance of 304.5 feet; thence S. 85 deg. 07 min. E. 156.1 feet; thence on a 12 deg. curve to the right, having a central angle of 33 deg. 35 min., a distance of 279.9 feet; thence S. 51 deg. 32 min. E. 75.1 feet; thence on a 12 deg. curve to the left, having a central angle of 34 deg. 16 min., a distance of 285.5 feet; thence S. 85 deg. 48 min. E. 61.5 feet; thence on an 8 deg. curve to the right, having a central angle of 36 deg. 58 min., a distance of 462.1 feet; thence S. 48 deg. 50 min. E. 290.3 feet; thence on a 6 degree curve to the left, having a central angle of 47 deg. 01 min., a distance of 293.9 feet; thence N. 84 deg. 09 min. E. 326.6 feet; thence on a 4 deg. curve to the right, having a central [26] angle of 37 deg. 33 min., a distance of 938.8 feet; thence S. 58 deg. 18 min. E. 656.2 feet; thence on a 6 deg. curve to the left, having a central angle of 7 deg. 19 min., a distance of 121.9 feet; thence S. 65 deg. 37 min. E. 215.1 feet; thence on a 21 deg. curve to the left, having a central angle of 33 deg. 41 min., a distance of 160.4 feet; thence N. 80 deg., 42 min. E. 3.5 feet to an interior point in Lot 3,

Section 3, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 7.53 acres, more or less, according to survey thereof, not including however, that part of said right of way contained within the SW.¼ of the SW.¼ of said Section 3.

The object of said proceeding is to ascertain and determine the compensation to be made in money to the owner or owners, respectively, and to all *ent*ants, encumbrancers and others interested, for the taking or injuriously affecting the lands, real estate and premises above described, in the manner set forth in said petition, and for a release from all liability for all damages to the adjoining lands of the respondents not taken, in any manner arising from the taking of the above-described property and the construction of a public highway thereon and to obtain a decree that the contemplated use for which said lands, real estate, premises and other property are sought to be appropriated is a public object and use and that the public interest required the laying out, establishment and construction of said highway, and that the said lands, real estate, premises and other property sought to be appropriated and injuriously affected are required and necessary for the laying out, establishment and construction of said highway.

NOTICE IS FURTHER GIVEN, That on the 30th day of January, 1929, at the hour of 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the petitioner will present said petition and proof in support thereof to said

Superior Court in the courthouse at Wenatchee, Washington, for hearing and determination and for the fixing of a time at which a jury shall be [27] called to determine the amount of compensation to be made and the parties to whom the same shall be paid.

Dated this 5th day of January, 1929.

CHELAN COUNTY, WASHINGTON,
Petitioner.
By J. A. ADAMS,
Prosecuting Attorney.

Office and Postoffice Address:
Commercial Bank Building,
Wenatchee, Chelan County, Wash.

Filed Jan. 30, 1929. [28]

(Following receipts attached:)

Post Office Department.
Official Business.
Registered Article No. S–7–39.
Insured Parcel No.....
Return to J. A. Adams, Pros. Attorney, Chelan Co.
Name of Sender.
Street and Number,)
or Post Office Box) 34 Commercial Bank Bldg.
Post Office at WENATCHEE,
State—WASHINGTON
Return Receipt—96376
99059

Received from the Postmaster the Registered or

Insured Article, the original number of which appears on the face of this Card.

Mr. & Mrs. T. S. TETTEMER,
Signature or name of addressee.
Mrs. T. S. TETTEMER,
Signature of addressee's agent.

Date of Delivery—1–14, 1929.

Post Office Department.
Official Business.
Registered Article No. S–7–31.
Insured Parcel No.....
Return to J. A. Adams, Pros. Attorney of Chelan Co.

(Name of Sender.)

Street and Number,)
or Post Office Box) 34 Commercial Bank Bldg.
Post Office at WENATCHEE
State—WASHINGTON
Return Receipt—83423

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the fact of the Card.

JOSEPH B. THOMAS,
(Signature or name of addressee.)
For Miss ALICE BARBEE WICK,

Date of Delivery—Jan'y 14th, 1928. [29]

[Title of Court and Cause—No. 8791.]

ORDER OF REMOVAL.

The petition of Margaret Rosborough and Alice Barbee Wick, respondents in the above-entitled

cause, having regularly come on for hearing and determination before the court on this 30th day of January, 1929, and said respondents appearing specially for the purpose only of removing said cause to the District Court of the United States, Eastern District of Washington, Northern Division; and it appearing to the court that said respondents have made and filed herein petition for removal in the form, at the time, in the manner, and in all respects as provided by law, and that they have filed herein a bond in the penal sum of $500.00 in due form and duly executed with good and sufficient surety, duly conditioned for said respondents entering in said District Court, within thirty days from the filing of said petition, a certified copy of the record of the Superior Court, and for paying all costs that may be awarded by said District Court if it shall hold that said suit was improperly or wrongfully removed thereto, and that written notice of said petition and bond was given to said petitioner prior to the filing of said petition and bond, in the form, at the time and in the manner provided by law, and that it is proper for said cause to be removed to said United States District Court,— [30]

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said petition and bond be and they are hereby accepted; that the above-entitled case be and it is hereby removed to said District Court of the United States, Eastern District of Washington, Northern Division; and that the Clerk of this court be, and he is hereby directed to prepare and certify forthwith a transcript of the

record in said cause for filing in the said District Court within the time allowed by law; and that all other proceedings in this court be stayed.

Done in open court this 30th day of January, 1929.

W. O. PARR,
Judge.

Filed and Recorded in Civil Journal Vol. 14, Page 366, Jan. 30, 1929. [31]

[Title of Court and Cause—No. 8791.]

Appearance Docket—Vol. 28, Page 316.

APPEARANCE DOCKET ENTRIES.

Plaintiff's Attorney—J. A. ADAMS.
Defendant's Attorney—J. D. CAMPBELL.
NATURE OF ACTION: Condemnation.

Date of Filing Mo. Day Year	Papers Filed	Fees
Jan. 5, 1929.	Notice and Petition.	
Jan. 5, 1929.	Affidavit for Publication.	
Jan. 25, 1929.	Notice and Petition for Bond for Removal	2.00
Jan. 25, 1929.	Petition for Removal, etc.	
Jan. 25, 1929.	Bond on Removal.	
Jan. 25, 1929.	Affidavit of Service.	
Jan. 30, 1929.	Affidavit of Publication.	
Jan. 30, 1929.	Order of Removal. [32]	

[Title of Court and Cause—No. 8791.]

CERTIFICATE OF CLERK OF SUPERIOR COURT TO TRANSCRIPT OF RECORD.

State of Washington,
County of Chelan,—ss.

I, L. T. Armstrong, Clerk of the Chelan County Superior Court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above-entitled cause as I have been directed by the appellants to transmit to the District Court.

IN TESTIMONY WHEREOF I have hereunto set my hand and the seal of said Superior Court this 19th day of February, 1929.

[Seal] L. T. ARMSTRONG,
Clerk.
By Gladys Simon,
Deputy Clerk. [33]

No. L.–4501.

AFFIDAVIT OF J. D. CAMPBELL.

State of Washington,
County of Spokane,—ss.

J. D. Campbell, atty. for defendant being first duly sworn, deposes and says: I served the attached notice and special appearance and motion to quash upon plaintiff, Chelan County, Washington, a municipal corporation, by depositing true and cor-

rect copies thereof in the postoffice at Spokane, Washington, properly wrapped for transmission through the mail, with postage prepaid thereon, addressed to Attorney J. A. Adams, Wenatchee, Washington. That there is regular mail communication between Spokane, Washington, and Wenatchee, Washington.

J. D. CAMPBELL.

Subscribed and sworn to before me this 15th day of March, 1929.

[Notarial Seal] JOSEPH ROSSLOW,
Notary Public, Residing at Spokane, Washington.

Filed Mar. 19, 1929. [34]

In the District Court of the United States, Eastern District of Washington, Northern Division.

On Removal from Chelan County, Washington.

No. L.–4501.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Respondents.

NOTICE.

To Chelan County, Washington, a Municipal Corporation, and to J. A. Adams, Your Attorney:

You will please take notice that the defendants

are appearing specially in the above-entitled cause and if the purpose for which said special appearance is made shall not be sanctioned or sustained by the court or by the appellate court if an appeal is taken within due time, said defendants will appear generally in the cause within the time allowed therefor by the law, or by the order of court, or by stipulation of parties.

This notice is given you in accordance with Rule 22 of the Rules of Practice of the Federal Court of the Ninth Judicial District.

J. D. CAMPBELL,
Attorney for Respondents, Appearing Specially.
P. O. Address:
1210 Old National Bank Bldg.,
Spokane, Washington. [35]

[Title of Court and Cause—No. L.–4501.]

SPECIAL APPEARANCE AND MOTION TO QUASH.

Come now the above-named respondents, Margaret Rosborough and Alice Barbee Wick, appearing herein specially for the purpose of this motion only, and object to the jurisdiction of this court over the persons of these respondents and each of them, and move the court to vacate and quash and set aside the pretended service of a notice of filing and of hearing of the petition of the above-named petitioner as pretended to be served upon these respondents and each of them, for the following reasons and upon the following grounds, viz.:

1. That the said pretended notice was and is irregularly and illegally issued.

2. That the said pretended notice is not such as is prescribed by law.

3. That said pretended notice has not been served or returned as provided by law.

4. That the statutes of the State of Washington on which the above-entitled proceeding was instituted, do not provide for sufficient or adequate service of notice in such cases upon nonresident owners of property affected. [36]

5. That said statutes do not either provide for personal service of such notice upon nonresidents of the State of Washington, nor the mailing of a copy of such notice to nonresidents as a prerequisite to the right of publication.

6. That the aforesaid pretended notice in the above-entitled action does not comply either in form or substance with the statute of the State of Washington governing these proceedings and does not constitute due notice.

7. That the effect of the service of the notice provided by said statutes of the State of Washington in this proceeding against interested parties or property owners not residing within the State of Washington, and especially upon those residing in a distant state, is to permit the property or property rights of such nonresident owners to be confiscated and taken without due process of law.

8. That the act or statute of the State of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act

or statute providing for the notice and service thereof by publication upon nonresident owners or interested parties, is contrary to the Constitution of the State of Washington which provides "that no person shall be deprived of life, liberty or property without due process of law," and is therefore unconstitutional and void.

9. That the effect of the service of the notice provided by said statutes of the State of Washington in this proceeding against interested parties or property owners not residing within the State of Washington, and especially those residing in a distant state of the United States, is to deny to them, as in this case, citizens of such other state, the privileges and immunities of citizens of the State of Washington, and permits the property or property rights of such nonresident owners to be confiscated and taken contrary to [37] Art. IV, Sec. 2 of the Constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and is therefore unconstitutional and void.

10. That the statute of the State of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and service thereof by publication upon nonresident owners or interested parties (who in this case are residents and citizens of the State of Pennsylvania), is contrary to the Constitution of the United States—Amendment 14, Sec. 1—which provides that no

state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws, and is therefore unconstitutional and void.

11. This motion is based upon all the records and files in the above pretended action.

J. D. CAMPBELL,
Attorney for Respondents, Appearing Specially.
P. O. Address:
1210 Old National Bank Building,
Spokane, Washington.

Service accepted and copy received this —— day of ————, 1929.

————————————,
Attorney for Petitioner. [38]

[Title of Court and Cause—No. L.–4501.]

ORDER DENYING MOTION TO QUASH.

The respondents' motion to quash having come on for hearing and determination before the court this 15th day of April, 1929, and respondents appearing specially in support of said motion, and Chelan County, Washington, a municipal corporation, petitioner, having appeared by its attorneys J. A. Adams and Sam Driver, and the court being fully advised in the premises, IT IS ORDERED, ADJUDGED AND DECREED that the motion to

quash made and entered herein be, and the same is hereby denied, to which ruling respondents except, and exception is allowed.

IT IS FURTHER ORDERED that respondents be and they are hereby given and granted fourteen days in which to appear further in said cause.

Done in open court this 15th day of April, 1929.

J. STANLEY WEBSTER,
Judge.

Filed Apr. 15, 1929. [39]

Filed Apr. 29, 1929.

[Title of Court and Cause—No. L.–4501.]

DEMURRER PRESERVING SPECIAL APPEARANCE.

Come now respondents and still reserving and retaining their special appearance and their right to question the jurisdiction of the court and the constitutionality of the statute or statutes by which they have been brought into court, and demur to the pretended petition on the following grounds and each of them:

1. That the court has no jurisdiction of the person of defendants or of either of them.

2. That the court has no jurisdiction of the subject matter of the action.

3. That the complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them.

4. That said pretended petition does not state facts sufficient to entitle petitioner to the relief asked.

5. That the statutes of the State of Washington relating to condemnation proceedings by corporations of the character of petitioner under which this proceeding was instituted are unconstitutional and void especially as to nonresidents, being in violation of Article III, Section 2, Article IV, Sec. 2, Amendment Article V, and Amendment Article XIV, Sec. 1, of the [40] Constitution of the United States, and each of them, and are also in violation of other provisions of the Constitution of the United States.

VI.

That the eminent domain statutes of the State of Washington being Secs. 921, 922, 924, 925, 926, 927, 929, 930, 932, 935, 936 of Remington's Code, are in violation of Article I, Secs. 2, 3, 16 and 32, and are in violation of Article II, Sec. 19, of the Constitution of the State of Washington, and each of them, and are also in violation of other provisions of the Constitution of the State of Washington.

VII.

That these proceedings are unconstitutional and void as to these respondents.

J. D. CAMPBELL,

Attorney for Respondents, Margaret Rosborough and Alice Barbee Wick, Appearing Specially.

[41]

Filed Apr. 29, 1929.

[Title of Court and Cause—No. L.–4501.]

MOTION TO MAKE MORE DEFINITE AND CERTAIN OR IN THE ALTERNATIVE FOR BILL OF PARTICULARS.

Come now respondents, and still reserving and retaining their special appearance and their right to question the jurisdiction of the court and the constitutionality of the statute or statutes by which they have been brought into court, and move the court to require petitioner to make its petition more definite and certain, or in the alternative to require petitioner to furnish bill of particulars by setting forth—

I.

As to paragraph 2 in said petition, by stating whether or not the purported resolution referred to in paragraph 2 of said petition appears as a part of the minutes of the proceedings of the county commissioners of Chelan County, Washington, and if so, to state the book or volume and page where recorded in said commissioners' minutes, and by stating whether or not, if so recorded, it is recorded in the same volume with the other minutes of said commissioners for said month of October, 1928.

II.

By making said paragraph 2 more definite and certain by setting out copy of said purported resolution referred to in said paragraph 2. [42]

III.

To make paragraph 3 of said petition more definite and certain by setting out in full the report of the county engineer together with map of proposed road, together with field notes and profiles of such survey, all as alleged in said paragraph 3 of said petition.

IV.

To make paragraph 3 of said petition more definite and certain by setting out the order or other record by which the said county commissioners set the matter of the alleged laying out and establishing of said road for hearing on November 23, 1928, at the office of the board of county commissioners in the courthouse at Wenatchee, Washington, together with a copy of said alleged notice and a copy of the proof of posting thereof, all as alleged in paragraph 3.

V.

To make paragraph 4 more definite and certain by setting out copy of said alleged order finding said road to be a public necessity and establishing said road and directing the prosecuting attorney of Chelan County, Washington, to proceed under the power of eminent domain to acquire said lands and other property rights, all as alleged in said paragraph 4.

VI.

To make paragraph 5 of said petition more definite and certain by setting out what portion of said property is owned by respondent, Margaret Rosborough, and how many acres it consists of; and by

setting out what portion belongs to respondent, Alice Barbee Wick, and how many acres her said property consists of.

VII.

To make said petition more definite and certain by setting out in full the proceedings before the county commissioners [43] of Chelan County, Washington, including copies of all minutes, records, resolutions, notices, proof of posting or service thereof leading up to the alleged laying out and establishment of said alleged road, and the authority conferred upon the prosecuting attorney of Chelan County, Washington, to bring said proceedings in eminent domain.

VIII.

To make said petition more definite and certain by setting out whether petitioner seeks to acquire full title to said real estate whereon said road is to be established, or whether petitioner seeks simply an easement for the purpose of constructing a highway over the same.

J. D. CAMPBELL,
Attorney for Respondents.

State of Washington,
County of Spokane,—ss.

J. D. Campbell, being first duly sworn, deposes and says: I am the attorney for respondents in the above-entitled action. I have read the foregoing motion for bill of particulars, and the same is not made for the purpose of delay, but the information called for therein is necessary to respondents in

order that they may safely plead to petitioner's petition.

J. D. CAMPBELL.

Subscribed and sworn to before me this 29 day of April, 1929.

[Seal] JOSEPH ROSSLOW,

Notary Public, Residing at Spokane, Washington. [44]

[Title of Court and Cause—No. L.–4501.]

ORDER DENYING MOTION TO MAKE MORE DEFINITE AND CERTAIN AND FOR BILL OF PARTICULARS, AND ORDER OVERRULING DEMURRER.

Respondents' motion to make more definite and certain or in the alternative for bill of particulars and respondents' demurrer to petition having come on for determination before the court this 21st day of October, 1929, petitioner having appeared by its attorneys, J. A. Adams and Sam Driver, and respondents having appeared specially by their attorney, J. D. Campbell, and the court being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED that said motion to make more definite and certain or in the alternative for bill of particulars be and the same is hereby denied.

IT IS FURTHER ORDERED that respondents' demurrer to petition herein be and the same is hereby overruled, to which ruling respondents except, and exception is allowed.

Done in open court this 21st day of October, 1929.

J. STANLEY WEBSTER,
District Judge.

Filed Oct. 21, 1929. [45]

Filed May 8, 1930.

[Title of Court and Cause—No. L.-4501.]

MOTION FOR ORDER SETTING CASE FOR TRIAL.

Comes now petitioner above named and respectfully moves the Court that the above-entitled cause be set down for trial.

This motion is based upon the records and files herein, and the subjoined affidavit.

J. A. ADAMS,
Prosecuting Attorney for Chelan County, Washington, Attorney for Petitioner.

AFFIDAVIT OF SAM M. DRIVER.

State of Washington,
County of Chelan,—ss.

Sam M. Driver, being first duly sworn on oath, deposes and says: That he is the duly appointed, qualified and acting deputy Prosecuting Attorney for Chelan County, Washington, and as such is one of the attorneys for the petitioner in the above-styled cause.

That said action was instituted in the Superior Court of the State of Washington in and for Chelan

County, by filing of petition and notice on the 5th day of January, 1929, for the purpose of acquiring by condemnation the real property of the respondents particularly described in said petition, for public highway purposes. That thereafter and on January 30, 1929, the said Superior Court made and entered its order removing said cause to the United States District Court, Eastern District of Washington, Northern Division. That respondents thereupon [46] appeared specially by their attorney J. D. Campbell of Spokane, Washington, and moved to quash service of notice in the above-styled action, which motion was denied by order of the above-entitled court made and entered on April 15, 1929. That respondents thereafter moved to require petitioner to make its petition more definite and certain and interposed a demurrer to said petition, which motion and demurrer were duly overruled by the above-entitled court by order made and entered on October 21, 1929.

That no further proceedings whatsoever have been had or taken in the above-styled cause, and that thereafter and prior to February 10, 1930, the exact date being to this affiant unknown, J. D. Campbell, attorney of record for the respondents, in the above-entitled action, died, and that since his death no other attorney has appeared of record in the action for the respondents, or either of them. That the attorneys for the petitioner first learned of the death of said J. D. Campbell on February 10, 1930, and thereafter, on February 13, 1930, affiant notified the respondents and each of them by

letter directed to the following address: "Care of Joseph B. Thomas, Suite 27 Transportation Building, 26 South 15th Street, Philadelphia, Pennsylvania," of the death of said J. D. Campbell. That respondents and each of them are residents of Philadelphia in the State of Pennsylvania according to affiant's information and belief, and that when the Board of County Commissioners for Chelan County, Washington, was considering the establishment of the highway involved in this action, one Adrian W. Vollmer, attorney at law, residing at Lakeside, Chelan County, Washington, wrote to the said Board of County Commissioners and to the Prosecuting Attorney of Chelan County, Washington, purporting to represent the respondents as their attorney, and advised said Prosecuting Attorney by letter as follows: "Please note that the mail [47] address of Miss Alice Barbee Wick and of Miss Margaret Rosborough is now care of Mr. Joseph B. Thomas, Suite 27 Transportation Building, 26 South 15th Street, Philadelphia, Pennsylvania." In this letter, which is dated July 6, 1928, the said Adrian W. Vollmer also requested that copies of notices and communications be sent to the parties at the above address. That affiant sent a copy of said letter, in which he advised respondents of the death of J. D. Campbell, and requested them to employ another attorney to represent them in the case, to said Adrian W. Vollmer, directed to Lakeside Post Office, Chelan County, Washington; that each of said letters was mailed in an envelope upon which appeared the return address of the Prosecuting At-

torney for Chelan County, Washington, and no copy of said letter was ever returned to him.

SAM M. DRIVER.

Subscribed and sworn to before me this 30th day of April, 1930.

[Notary Seal—J. A. Adams.]

J. A. ADAMS.

Notary Public in and for the State of Washington, Residing at Wenatchee. [48]

AFFIDAVIT OF MAILING.

State of Washington,
County of Chelan,—ss.

I, Faye Hamilton, being first duly sworn on oath, depose and state:

That I am and was at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of twenty-one years, competent to be a witness in the within entitled action, and not a party to it.

That I served the attached motion upon Miss Margaret Rosborough and Miss Alice Barbee Wick, and upon Mr. Adrien W. Vollmer, by mailing by registered mail a true and correct copy of the said attached motion to the said Miss Margaret Rosborough, and Miss Alice Barbee Wick, and Mr. Adrian W. Vollmer, the said copies being deposited in envelopes addressed: "Miss Margaret Rosborough, Miss Alice Barbee Wick, Care of Mr. Joseph B. Thomas, Suite 27, Transportation Building, 26 South 15th Street, Philadelphia, Pa. Register RRR"; and "Mr. Adrian W. Vollmer,

Attorney, Lakeside Post Office (Chelan County) Washington, Please Forward if Necessary. Register RRR"; and with the postage thereon fully prepaid, same being deposited in the postoffice at Wenatchee, Washington, on the 2d day of May, 1930.

FAYE HAMILTON.

Subscribed and sworn to before me this 7th day of May, 1930.

[Notary Seal] L. J. GEMMILL,
Notary Public in and for the State of Washington,
Residing at Wenatchee. [49]

Penalty for Private Use to Avoid Payment of Postage $300.
Post Office Department.
Official Business.
Registered Article.
No. S–2013.
Post Mark of Delivering Office—and Date of Delivery:

Philadelphia Pa 8
May 13
6 PM
1930

Address Your Mail
to Street and
Number

Insured Parcel
No. 52131
60774
Return to J. A. ADAMS, Prosecuting Attorney.
(Name of Sender.)

Street and Number,)
or Post Office Box.) 31 Commercial Bank Bldg.
Post Office at Wenatchee,
State Washington.

Rev. 3–24
c5–6116

RETURN RECEIPT.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

MARGARET ROSBOROUGH.
(Signature or name of addressee.)
Per JOSEPH B. THOMAS, Atty.
(Signature of addressee's agent.)

Date of delivery, May 13, 1930.
Form 3811.
Government Printing Office. c5–6116
Filed May 26, 1930. [50]

D. C. Form No. 18.

United States District Court, Northern Division, Eastern District of Washington.

No. L.–4501.

CHELAN COUNTY
vs.
MARGARET ROSBOROUGH and ALICE BARBEE WICK.

NOTICE OF HEARING FOR ORDER OF NECESSITY.

To Margaret Rosborough and Alice Barbee Wick, Defendants (c/o Joseph B. Thomas, Suite 27 Transportation Bldg., 26 S. 15th St., Philadelphia, Pa.), and to Adrian W. Vollmer, Esq., Attorney for Said Parties (Lakeside, Washington).

Take notice that the above-entitled case has been set for hearing in said Court at Spokane, Wn., on June 5, 1930, at 10 A. M., for an Order of Necessity.

EVA M. HARDIN,
Clerk.

(Notices mailed by ordinary mail May 26, 1930.)
ELC.

7–1525. [51]

D. C. Form No. 18.

United States District Court, Northern Division, Eastern District of Washington.

No. L.–4501.

CHELAN COUNTY
vs.
MARGARET ROSBOROUGH and ALICE BARBEE WICK.

NOTICE.

To J. A. Adams, Prosecuting Attorney for Chelan County, Washington: To Margaret Rosborough

and Alice Barbee Wick, Defendants (c/o Joseph B. Thomas, Suite 27 Transportation Bldg., 26 S. 15th St., Philadelphia, Pa.), and to Adrian W. Vollmer, Esq., Attorney for Said Parties, Lakeside, Washington:

Take notice that the above-entitled case has been set for trial in said court at Federal Bldg., Spokane, on Thursday, Nov. 20, 1930, at 10 A. M.

EVA M. HARDIN,
Clerk U. S. Dist. Court.

(Notices mailed as above indicated by ordinary mail 10–28–30.)

E. L. C.

7–1525. [52]

[Title of Court and Cause—No. L.–4501.]

AFFIDAVIT OF ADRIEN WINSTON VOLLMER.

State of Pennsylvania,
City and County of Philadelphia,—ss.

Adrien Winston Vollmer, being first duly sworn on oath, deposes and says: That he is not and has never been and never pretended to be counsel for either or both of said parties in said cause, nor has he ever appeared in said cause. That he does not reside in the State of Washington and has not even visited or been in said State for over twenty-three months.

ADRIEN WINSTON VOLLMER.

Sworn and subscribed to before me this 7 day of November, 1930.

[Notarial Seal] LINDEN T. HARRIS,
Notary Public in and for the State of Pennsylvania,
Residing at Philada.

LINDEN T. HARRIS,
Notary Public.

Commission expires April 1, 1931.
Filed Nov. 18, 1930. [53]

[Title of Court and Cause—No. L.–4501.]

AFFIDAVIT OF MAILING.

State of Washington,
County of Spokane,—ss.

I, Alma Pendell, being first duly sworn on oath, do depose and say: That I am and was at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of twenty-one years, competent to be a witness in the within entitled action and not a party to it.

That I served the attached affidavit of Adrien Winston Vollmer upon J. A. Adams, Prosecuting Attorney for Chelan County, by registered mail; a true and correct copy of the said attached affidavit being deposited in envelope addressed to Mr. J. A. Adams, Prosecuting Attorney for Chelan County, Wenatchee, Washington, and with postage thereon fully prepaid, same being deposited in the postoffice at Spokane, Washington, on the 17th day of November, 1930. Attached hereto is the receipt num-

bered 12881 issued by the postoffice to me for the said registered mail.

ALMA PENDELL.

Subscribed and sworn to before me this 17th day of November, 1930

FLORENCE E. WHITE,

Notary Public in and for the State of Washington,
Residing at Spokane.

[Notarial Seal—Florence E. White, Notary Public, State of Washington.]

Commission expires Nov. 1, 1932. [54]

(Postmark of
Spokane, Wash.
Nov. 17, 1930.
Reg. Div.)
(Mailing Office.)

Receipt for Registered Article No. 12881.
Registered at the Post Office Indicated in Postmark.
Fee paid 15 cents Class postage.
Return Receipt fee 3 Spl. Del'y fee ——.
Delivery restricted to addressee: in person ——, or order ——.

Accepting employee will place his initials in space indicating restricted delivery.

POSTMASTER, per A.

The sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Registry Fees and Indemnity.—Domestic registry fees range from 15 cents for indemnity not ex-

ceeding $50 up to $1 for indemnity not exceeding $1,000. The fee on domestic registered matter without intrinsic value and for which indemnity is not paid is 15 cents. Consult postmaster as to the specific domestic registry fees and as to the registry fees chargeable on registered parcel-post packages for foreign countries. Fees on domestic registered C. O. D. mail range from 25 cents to $1.20. Indemnity claims must be filed within one year (C. O. D. six months) from date of mailing.

Form 3806 (Rev. 7–1–29.)

c5–6852. U. S. Government Printing Office 1929. [55]

PLAINTIFF'S EXHIBIT No. 1.

Adm. E. M. H.

L.–4501—L.–4502.

RESOLUTION.

The Board of County Commissioners of Chelan County, Washington, at a regular meeting of the board held on the 30th day of October, 1928, by unanimous vote of such board adopted the following Resolution:

"BE IT RESOLVED, that the Board of County Commissioners of Chelan County, Washington, hereby declare their intention to lay out and establish a county road along the southerly shore of Lake Chelan in said county, to be known as the Change in South Lake Shore Estension Road, beginning at an interior point in Lot 3 of Section 3, Township 27 N. R. 21, E. W. M. at survey station 420+96.5 of South Lake Shore Road as now established

and of record, and running thence in a general northwesterly direction by a most feasible route and ending at survey station 488+00.9 (an intersection with Twenty-five Mile Creek Road) being an interior point in the SW¼ NE¼ Section 4, Township 27 N. R. 21, E. W. M., the whole distance being about 1.3 miles; and said board do hereby declare that said road is considered a public necessity.

And the county engineer of said county is hereby directed to make an examination of such proposed road and if necessary a survey thereof and report upon such project in writing to the Board.

THE BOARD OF COUNTY COMMISSIONERS OF CHELAN COUNTY, WASHINGTON.

J. H. MILLER.
J. A. WILSON.
W. J. TAYLOR.

Attest: A. V. SHEPHARD,
Clerk. [56]

State of Washington,
County of Chelan,—ss.

In the Matter of the Resolution of BOARD OF COUNTY COMMISSIONERS et al. for for a County Road to be Known as the South Lake Shore Extension Road.

FIELD NOTES.

Said road commences at survey station 420+96.5 of South Lake Shore Road being an interior point in Government Lot 3 of Section 3, T. 27 N., and run thence as follows, from a course bearing N. 63° 52′ W.

Sta.	Course.	Distance feet.	Feet Curves.	Remarks.
	N 63° 52′ W			
420+96.5	P. C.		D 20° L	
421+88.0	P. I.		△ 35° 26′	
			T 91.5	
422+73.7	P. T		L 177.2	
	S 80° 42′ W	3.5		
422+77.2	P. C.			
			D 21° R	
423+59.8	P. I.		△ 33° 41′	
			T 82.6	
424+37.6	P. T.		L 160.4	
	N 65° 37′ W	215.1		
462+52.7	P. C.		D 6° R	
427+13.7	P. I.		△ 7° 18′	

Sta.	Course.	Distance feet.	Feet Curves.	Remarks.
			T 61.0	
427+74.6	P. T.		L 121.9	
	N 58° 18′ W	656.2		
434+30.8	P. C.			
			D 4° L	
439+17.8	P. I.		△ 37° 33′	
			T 487.0	
443+69.6	P. T.		L 938.8	
	S 84° 09′ W	326.6		
446+96.2	P. C.			
[57]				
			D 6° R	
448+52.0	P. I.		△ 47° 01′	
			T 155.8	

Sta.	Course.	Distance feet.	Feet Curves.	Remarks.
449+90.1	P. T.		L 293.9	
	N 48° 50′ W	290.3		
452+80.4	P. C.			
			D 8° L	
455+19.8	P. I.		△ 36° 58′	
457+42.5	P. T.		T 239.4	
			L 462.1	
	N 85° 48′ W	61.5		
458+04.0	P. C.			
			D 12° R	
459+51.2	P. I.		△ 34° 16′	
			T 147.2	
460+89.5	P. T.		L 285.5	

Sta.	Course.	Distance feet.	Curves.	Remarks.
	N 51° 32′ W	75.1		D
461+64.6	P. C.		D 12° L	I
463+08.7	P. I.		△ 33° 35′	A
			T 144.1	G
464+44.5	P. T.		L 279.9	R
	N 85° 07′ W	156.1		A
466+00.6	P. C.			M
			D 10° R	S
467+56.6	P. I.		△ 30° 27′	
			T 156.0	O
469+05.1	P. T.		L 304.5	M
	N 54° 40′ W	442.7		I
473+47.8	P. C.			T
			D 6° R	T
475+11.8	P. I.		△ 19° 29′	E
			T 164.0	D

Sta.	Course.	Distance feet.	Feet Curves.	Remarks.
476+72.5	P. T.		L 324.7	
	N 35° 11′ W	106.6		
477+79.1	P. C.			
			D 2° L	
479+83.2	P. I.		△ 8° 09′	
			T 204.1	
481+86.6	P. T.		L 407.5	
	N 43° 20′ W	231.9		
484+18.5	P. C.			
			D 6° R	
485+44.6	P. I.		△ 15° 03′	
			T 126.1	
486+69.3	P. T.		L 250.8	
	N 28° 17′ W	131.6		
488+00.9				Point in present traveled road end of new location. [58]

I hereby certify that the field notes and maps herewith submitted are correctly prepared, and that the survey was made on April 27, and 28, May 12, 21, 22, June 22 and July 3, 1928.

Dated this 30th day of October, 1928.

JOHN DUFF,
County Engineer. [59]

State of Washington,
County of ———,—ss.
In the Matter of the Petition of ———— et al. for a County Road to be Known as the ———— Road.

FIELD NOTES.

Said road commences at ....

Level notes as follows:

Sta.	+ Rod	H. I	– Rod	Elev.	Remarks
	6.32	1177.45			1171.13 on G. N. "P" Line Hub.
420+96.5 P. C.			13.2	1164.3	
421+00			13.1	64.4	
+50			9.8	67.6	
422+00			7.2	70.2	
+50			4.3	73.1	
+73			10.71	66.74	
423+00			14.8	62.6	

Sta.	+ Rod	H. I	− Rod	Elev.	Remarks
T. P.	2.67	1170.00	10.12	1167.33	
+50			14.7	55.3	
424+00			7.4	62.6	
+50			5.4	64.6	
425+00			4.5	65.5	
+50			2.6	67.4	
[60]					
425+70	.	1170.00	.09	69.1	
T. P.	4.75	1173.53	1.22	1168.78	
426+00			5.7	67.8	
+50			8.1	65.4	
427+00			7.5	66.0	
+50			6.2	67.3	
428+00			5.2	68.3	
+50			4.8	68.7	
429+00			3.2	70.3	

Sta.	+ Rod	H. I	− Rod	Elev.	Remarks
B. M.			6.04	1167.49	1167.49 on 36″ pine tree 5 ft. right Sta. 428+65
T. P.	2.26	1175.35	0.44	1173.09	
+50			2.2	73.1	
430+00			2.7	72.6	
+50			3.6	71.7	
431+00			5.8	69.5	
+50			5.7	69.6	
432+00			4.5	70.8	
+50			5.0	70.3	
433+00			7.4	68.0	
+23			12.7	62.6	
+50			10.5	64.8	
434+00			5.3	70.0	
+50			3.3	72.0	
T. P.	1.37	1174.24	2.48	1172.87	
435+00			3.6	70/6	

Sta.	+ Rod	H. I	– Rod	Elev.	Remarks
+50			6.0	68.2	
436+00			9.2	65.0	
+50			11.3	62.9	
T. P.	6.91	1170.72	10.43	1163.81	
+92.5			10.72	1160.00	on hub
437+00			11.4	59.3	
[61]					
437+50		1170.72	14.8	1155.9	
438+00			11.6	59.1	
+50			8.1	62.6	
439+00			4.0	66.7	
+50			2.8	67.9	
B. M.			8.73	1161.99	1161.99 spike in 18″ pine tree 40 Ft right of Sta 439+75
440+00			4.4	66.3	
+20			5.8	64.9	

Sta.	+ Rod.	H. I.	– Rod.	Elev.	Remarks.
+50			11.2	59.5	
+70			4.6	66.1	
441+00			1.2	69.5	
T. P.	1.13	1170.97	0.88	1169.84	
+50			3.1	67.9	
442+00			5.5	65.5	
+50			8.9	62.1	fence line
443+00			9.5	61.5	
+50			7.7	63.3	
444+00			4.1	66.9	
B. M.			8.44	1162.53	on 24″ pine tree 25 Ft Rt. Sta. 444+40=G. N. B. M. Elev. 1162.59
T. P.	4.10	1172.08	2.99	1167.98	
+50			2.4	69.7	
445+00			2.7	69.4	
+50			4.4	67.7	

Sta.	+ Rod.	H. I.	– Rod.	Elev.	Remarks.
446+00			6.7	65.4	
+50			7.8	64.3	
447+00			8.5	63.6	
+50			7.6	64.5	
448+00			6.8	65.3	
T. P.	5.44	1171.70	5.82	1166.26	
+50			6.2	65.5	
[62]					
449+00			6.4	65.3	
+50			5.2	66.5	
450+00			6.0	65.7	
[63]					
450+50		1171.70	6.7	1165.0	
451+00			6.8	64.9	
+50			6.3	65.4	
T. P.	4.29	1170.62	5.37	1166.33	

Sta.	+ Rod.	H. I.	– Rod.	Elev.	Remarks.
452+00			4.1	66.5	
+50			4.8	65.8	
453+00			5.5	65.1	
+50			6.7	63.9	
454+00			7.8	62.8	
+50			8.3	62.3	
T. P.	6.54	1167.60	9.56	1161.06	
455+00			4.6	63.0	
+50			3.5	64.1	
456+00			4.0	63.6	
+50			4.2	63.4	
457 00			4.2	63.4	
T. P.	2.97	1168.33	2.24	1165.36	
+50			3.1	65.2	

I hereby certify that the field notes and maps herewith submitted are correctly prepared, and that the survey was made on .....

Dated this 30 day of October, 1928.

JOHN DUFF,
County Engineer. [64]

State of Washington,
County of ———,—ss.
In the Matter of the Petition of ———— et al.
for a County Road to be Known as the
———— Road.

FIELD NOTES.

Said road commences at .....

Leavel Notes Continued — Distance

Sta.	+ Rod.	Distance, Feet H. I.	– Rod.	Elev.	Remarks.
458+00		1168.33	4.56	1163.7	
+50			5.6	62.7	
459+00			6.6	61.7	
B. M.			0.15	1168.18	On School Marm Stump 25′ Lt. Sta. 459 10=G. N. B. M. Elev. 1168.24

Sta.	+ Rod.	Distance, Feet H. I.	Distance Feet – Rod.	Elev.	Remarks.
+50			7.2	61.1	
460+00			6.6	61.7	
+50			7.2	61.1	
461+00			7.0	61.3	
+50			6.2	62.1	
T. P.	5.65	1168.15	5.83	1162.50	On hub 461+60.7
642+00			5.6	62.6	
+50			5.0	63.2	
463+00			4.9	63.3	
+50			4.7	63.4	

[65]

Sta.	+ Rod.	H. I.	– Rod.	Elev.	Remarks.
464+00		1168.15	6.0	62.2	
+50			6.9	61.3	
465+00			6.5	61.7	
+50			6.0	62.2	
T. P.	5.76	1168.56	5.35	1162.80	
466+00			5.8	62.8	
+50			5.1	63.5	
467+00			5.7	62.9	
+50			6.4	62.2	
468+00			6.1	62.5	
+50			6.5	62.1	
469+00			6.3	62.3	
+50			5.2	63.4	
470+00			4.8	63.8	
+50			3.8	64.8	
471+00			2.7	65.9	

Sta.	+ Rod.	H. I.	– Rod.	Elev.	Remarks.
+50			1.8	66.8	
T. P.	11.24	1178.80	1.00	1167.56	
+55			14.0	64.8	
+72			14.4	64.4	
+80			10.2	68.6	
472+00			9.6	69.2	
+50			9.0	69.8	
473+00			9.8	69.0	
+50			11.4	67.4	
474+00			9.7	69.1	
+50			7.8	71.0	
475+00			7.0	71.8	
[66]					
+50			5.8	73.0	
476+00			4.9	73.9	
+50			4.2	74.6	
+72.5			5.2	73.6	
[67]					

Sta.	+Rod	H. 1	-Rod	Elev.	Remarks.
447+00		1178.80	3.9	74.9	
T. P.	6.80	1182.83	2.77	1176.03	
+50			8.7	74.1	
478+00			5.4	77.4	
B. M.			5.87	1176.96	Spike in 12″ pine tree 5 Ft. Rt. Sta. 477+80=G. N. B. M. Elev. 1176.96
T. P.	5.32	1187.95	0.20	1182.63	
+44			5.3	82.7	
+58			6.4	81.6	
+60			3.0	85.0	
479+00			2.3	85.7	
+50			7.8	80.2	
T. P.	10.59	1187.10	11.44	1176.51	
480+00			10.1	77.0	
+50			7.6	79.5	
481+00			3.8	83.3	

Sta.	+Rod	H. 1	−Rod	Elev.	Remarks.
+50			2.2	84.9	Irrigation Ditch.
T. P.	12.85	1199.89	0.06	1187.04	
482+00			14.6	85.3	
+50			11.4	88.5	
483+00			6.8	93.1	Irrigation Ditch.
+50			3.5	96.4	
B. M.			3.24	1196.65	On 12″ poplar tree 40 Ft. Lt. Sta. 483+10.
+58.1			3.37	96.5	Hub.
T. P.	7.18	1195.78	11.29	1188.60	
+90			13.0	82.8	
484+00			14.0	81.8	
+27			15.7	80.1)	
+40			14.8	81.0)	Creek.
+42			12.9	82.9	

Sta.	+Rod	H. 1	−Rod	Elev.	Remarks.
+50			11.2	84.6	
+92			9.2	86.6	
[68]					
485+00			6.3	89.5	
+50			1.9	93.9	
[69]					
		1195.78			
T. P.	9.58	1204.82	0.54	1195.24	
486+00			6.8	98.0	
+50			7.6	97.2	
487+00			4.3	1200.4	
+35			1.8	1202.9	
T. P.	9.02	1213.20	0.64	1204.18	
+50			6.7	1206.5	
+70			3.6	1209.6	
488+00.9			3.9	1209.3	End of Proposed Improvement.
B. M.			4.58	1208.62	On 20″ pine tree 50 Ft. Lt. Sta. 487 50=G. N. B. M. Elev. 1208.67.

I hereby certify that the field notes and maps herewith submitted are correctly prepared, and that the survey was made on April 27 and 28, May 12–21 and 22, June 22 and July 3rd, 1928.

Dated this 30th day of October, 1928.

JOHN DUFF,
County Engineer. [70]

State of Washington,
County of Chelan,—ss.

In the Matter of the Resolution of the BOARD OF COUNTY COMMISSIONERS for a County Road to be Known as the South Lake Shore Extension Road.

ENGINEER'S REPORT.

To the Honorable Board of County Commissioners of Said County:

Gentlemen: I, John Duff, County Engineer of said County, having, on the 30th day of October, 1928, been duly ordered by your Honorable Board to make an examination and if necessary, a survey of the above proposed road and report thereon, did, on the 30th day of October, 1928, and the —— days of 19—, in obedience to said order and the statutes in such cases made and provided, proceed to and did make said examination and survey and herewith submit the following as my report thereon:

FIRST.

In my opinion said road is a necessity and should be established and opened, for the reason that there is no other road which is of equal utility for the

citizens residing in the vicinity of said proposed road.

SECOND.

The terminal points, general course and length of said proposed road, as examined and surveyed, are as follows:

Commencing at survey station 420+96.5 of South Lake Shore Road, as of record, the same being an interior point in Govt. Lot 3, of Sec. 3, Twp. 27 N. Rg. 21 E., W. M., runs thence in a general northwest [71] direction, across Govt. Lots 3, 2 and 1 and the SW.¼ of SW.¼ of Sec. 3, Twp. 27 N. Rg. 21 E., W. M., and Govt. Lots 6 & 5 of Sec. 4, Twp. 27 N., Rg. 21 E., W. M., and the SW.¼ of NE.¼ of Sec. 4, Twp. 27 N., Rg. 21 E., W. M., and ends at survey sta. 488+00.9 being an interior point in the SW.¼ of NE.¼ of Sec. 4, Twp. 27 N., Rg. 21 E., W. M., the total length being 1 mile 146 rods and 15.4 feet.

THIRD.

I recommend that said road be established sixty (60) feet in width, except as hereinafter stated, to wit:

FOURTH.

The names of persons interested in lands over which said proposed road will pass, who consent to the establishment of the same, and waive all claims for damages caused thereby, are shown below.

FIFTH.

The names of all persons interested in lands over which said proposed road will pass, who refuse their consent to the establishment of same, together

with the amount of damages claimed by each, are shown below.

SIXTH.

An estimate of damages to each tract of land of non-consenting persons interested in such tract of land over which said proposed road will pass, is shown below.

SEVENTH.

A description of each tract of land over which said proposed road will pass, with the name and place of residence or address of the owners, lessees, claimants or encumbrancers thereof, if known and the quantity of land to be taken from each of said tracts, is shown below: [72]

Names and Address or Residence of Owner Lessee or Incumbrancer. State if Unknown.	Description of Land. Subdivision.	Sec.	Twp.	Rge.	Quantity to be taken. Acres.	100's.	Estimated Damages. $ Cts.	Estimated Benefits. $ Cts.	Damages Claimed. $ Cts.	Remarks. State if Damages Claimed Waived or Don't Consent.
Margaret Rosborough, Philadelphia, Penn.	Lot	3	3	27	21	1 78				
"	Lot	2	3	27	21	1 87				
"	Lot	1	3	27	21	2 02				
"	Lot	6	4	27	21	1 85				
Alice Barbee Wick Philadelphia, Penn.	SW.¼ of SW.¼		3	27	21	02				
"	Lot	5	4	27	21	49				
Kathryn Watson	SW.¼ of NE.¼		4	27	27	Right of way secured.				

EIGHTH.

The probable cost of construction of said road will be as follows:

Items.	Amount.
Bridges and Culverts	600.00
Clearing and Grubbing	400.00
Grading	14,500.00
Damages	
Cost Bill of Survey (estimated).....	150.00
Total estimated cost of said road....	15,650.00

NINTH.

Such other facts, matters and things as I deem important to be known by your Honorable Board, are as follows:

The character of right of way is as follows: [73] 1500 ft. of steep side hill with some small timber, 2170 ft. of raw land with grease wood & scrub pine, slope not so steep, 305 ft. of light slope, scattered scrub pine & grease wood, 225 ft. raw land cleared, 750 ft. cleared & cultivated, 500 ft. part orchard rest uncultivated, 100 ft. cleared raw land, 350 ft. second growth pine, balance to end of road same as last with *xing* for creek, land rocky.

I also file with this report the written consent and waivers of claims to damages, together with claims for damages, by persons interested in the lands affected by the establishment of said proposed road; a map of said proposed road as the same is laid out and surveyed, with the name of the owner of each tract of land written thereon, and a transcript of the field notes of the survey thereof.

Respectfully submitted this 30th day of October, 1928.

JOHN DUFF,
County Engineer.

By ————————,
Deputy. [74]

NOTICE OF HEARING ON CHANGE IN SOUTH LAKE SHORE EXTENSION ROAD.

NOTICE IS HEREBY GIVEN, That a hearing will be held before the Board of County Commissioners of Chelan County, Washington, on November 23d, 1928, at the hour of 10:30 A. M.

Said hearing will be held at the Commissioner's Office in the Court House in Wenatchee, Washington, to determine whether a proposed county road shall be established, being a change in the South Lake Shore Road along the Southerly side of Lake Chelan, the width of said road shall be 60 feet and the termini and route thereof as recommended in the County Engineer's report is as follows:

Commencing at survey sta. 420+96.5 of So. Lake Shore Road, as of record being an interior point in Lot 3 of Sec. 3., Twp. 27 N., Rg. 21 E., *E* W. M., running thence, from a course N. 63° 52′ W. on a 20° curve to left thru an angle of 35° 26′ 177.2 ft. thence S. 80° 42′ W. 3.5 ft. thence on a 21° curve to right thru an angle of 33° 41′, 160.4 ft; thence N. 65° 37′ W., 215.1 ft.; thence on 6° curve to right, thru an angle of 7° 19′, 121.9 ft.; thence N. 58° 18′ W. 656.2 ft.; thence on 4° curve to left thru an

angle of 37° 33′, 938.8 ft.; thence S. 84° 09′ W., 326.6 ft.; thence on a 16° 00′ curve to the right thru an angle of 47° 01′, 293.9 ft. thence N. 48° 50′ W., 290.3 ft., thence on an 8° 00′ curve to left thru angle of 36° 58′, 462.1 ft., thence N. 85° 48′ W., 61.5 ft. thence on a 12° 00′ curve to right thru an angle of 34° 16′, 285.5 ft.; thence N. 51° 32′ W., 75.1 ft.; thence on a 12° 00′ curve to left, thru an angle of 33° 35′, 279.9 ft.; thence N. 85° 07′ W., 156.1 ft.; thence on a 10° 00′ curve to right thru an angle of 30° 27′, 304.5 ft.; thence N. 54° 40′ W., 442.7 ft.; thence on a 6° 00′ curve to right thru an angle of 19° 29′—324.7 ft.; thence N. 35° 11′ W., 106.6 ft.; thence on 2° 00′ curve to left thru an angle of 8° 09′,—407.5 ft.; thence N. 43° 20′ W., 231.9 ft.; thence on a 6° 00′ curve to right thru an angle of 15° 03′, 250.8 ft.; thence N. 28° 17′ W. 131.6 ft. and ending at survey sta. 488+00.9 (an intersection with Twenty-five Mile Creek Road) being an [75] interior point in S. W. ¼ of N. E. ¼ of Sec. 4 Twp. 27 N. Rg. 21 E., W. M. the whole distance being about 1.3 miles, said road to be known as the So. Lake Shore Extension Road, all in Chelan County, Washington.

At said hearing any interested persons may appear and be heard for or against the establishment of the proposed change, in the South Lake Shore Road.

Dated at Wenatchee, Washington, this 31st day of October, 1928.

A. V. SHEPARD,
Clerk of the Board. [76]

AFFIDAVIT OF POSTING NOTICES.

State of Washington,
County of Chelan,—ss.

In the Matter of the Resolution of COUNTY COMMISSIONERS et al. for a County Road to be Known as So. Lake Shore Extension Road.

John H. Larner, being first duly sworn on oath, deposes and *say* that on the 1st day of November, 1928, he posted due and legal notices of the hearing upon the report of the Engineer in the matter of the County Road above mentioned, as follows:

One notice on 4″ pine tree 10 ft. to right of Sta. 422+25

One notice on 5″ pine tree 5 ft. to left of Sta. 449+10

One notice on 4″ pine tree 5 ft. to left of Sta. 487+55

JOHN H. LARNER.

Subscribed and sworn to before me this 2d day of November, 1928.

JOHN GODFREY.

Seal
Chelan County
Auditor's
Seal

State of Washington [77]

In the Superior Court of the State of Washington, in and for the County of Chelan.

In the Matter of THE CHANGE IN SOUTH LAKE SHORE EXTENSION ROAD, CHELAN COUNTY.

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of Chelan,—ss.

D. R. Stohl, being first duly sworn on oath, depose and say: That I am the principal clerk of the World Publishing Company, a corporation organized and existing under the laws of the State of Washington, the owner and publisher of "The Wenatchee Daily World," a legal daily newspaper printed and published at the office of the owner and publisher thereof in the city of Wenatchee, County of Chelan, and State of Washington, since prior to the year 1910; That I make this affidavit for and on behalf of said corporation; that said newspaper is a newspaper of general circulation in said county and state, and has at all times been and now is printed and published in the English language, and that the notice of hearing in the matter of the Change in South Lake Shore Extension Road, Chelan County, No. ——, a printed copy of which is hereunto attached, was published in said newspaper proper and not in supplement form in the regular and entire edition of said paper once each week for a period of 4 consecutive weeks, beginning on the 1

day of November, 1928, and ending on the 22 day of November, 1928, both dates inclusive, and that said newspaper was regularly distributed to its subscribers during all of said period.

That the full amount of the fee charged for the foregoing publication is the sum of $7.75 which amount has been paid in full.

D. R. STOHL. [78]

Subscribed and sworn to before me this 22 day of November, 1928.

A. V. SHEPHARD,

Deputy Auditor in and for the State of Washington, Residing at Wenatchee, Chelan County.

[Chelan County
Auditor's
Seal
State of Washington.] [79]

NOTICE OF HEARING ON CHANGE IN SOUTH LAKE SHORE EXTENSION ROAD.

NOTICE IS HEREBY GIVEN, That a hearing will be held before the Board of County Commissioners of Chelan County, Washington, on November 23rd, 1928, at the hour of 10:30 A. M.

Said hearing will be held at the Commissioner's Office in the Courthouse in Wenatchee, Washington, to determine whether a proposed county road shall be established, being a change in the South Lake Shore Road along the southerly side of Lake Chelan, the width of said road shall be 60 feet and the ter-

mini and route thereof as recommended in the County Engineer's report is as follows:

Commencing at survey station 420 plus 96.5 of So. Lake Shore Road, as of record being an interior point in Lot 3 of Sec. 3, Twp. 27 N., Rg. 21, E. W. M., running thence from a course N. 63 deg. 52 min. W. on a 20 deg. curve to left through an angle of 35 deg. 26 min, 177.2 ft.; thence S. 80 deg. 42 min. W. 3.5 feet; thence on a 21 deg. curve to right through an angle of 33 deg. 41 min. 160.4 feet; thence N. 65 deg. 37 min. W. 215.1 feet; thence on 6 deg. curve to right, through an angle of 7 deg. 19 min. 121.9 feet; thence N. 58 deg. 18 min. W. 656.2 feet; thence on 4 deg. curve to left through an angle of 37 deg. 33 min. 938.8 feet; thence S. 84 deg. 09 min. W. 326.6 feet; thence on a 16 deg. 00 min. curve to the right through an angle of 47 deg. 01 min. 293.9 feet; thence N. 48 deg. 50 min. W. 290.3 feet; thence on an 8 deg. 00 min. curve to left through angle of 36 deg. 58 min. 462.1 feet; thence N. 85 deg. 48 min. W. 61.5 feet; thence on a 12 deg. 00 min. curve to right through an angle of 34 deg. 16 min. 285.5 feet; thence N. 51 deg. 32 min. W. 75.1 feet; thence on a 12 deg. 00 min. curve to left, through an angle of 33 deg. 35 min. 279.9 feet; thence N. 85 deg. 07 min. W. 156.1 feet; thence on a 10 deg. 00 min. curve to right through an angle of 30 deg. 27 min. 304.5 feet; thence N. 54 deg. 40 min. W. 442.7 feet; thence on a 6 deg. 00 min. curve to right through an angle of 19 deg. 29 min. 324.7 feet; thence N. 35 deg. 11 min. W. 106.6 feet; thence on a 2 deg. 00 min. curve to left through

an angle of 8 deg. 09 min. 407.5 feet; thence N. 43 deg. 20 min. W. 231.9 feet; thence on a 6 deg. 00 min. curve to right through an angle of 15 deg. 03 min. 250.8 feet; thence N. 28 deg. 17 min. W. 131.6 feet, and ending at survey station 488 plus 00.9 (an intersection with Twenty-five Mile Creek Road), being an interior point in S. W. ¼ of N. E. ¼ of Sec. 4, Twp. 27 N., Rg. 21, E. W. M., the whole distance being about 1.3 miles, said road to be known as the So. Lake Shore Extension Road, all in Chelan County, Washington.

At said hearing any interested persons may appear and be heard for or against the establishment of the proposed change, in the South Lake Shore Road.

Dated at Wenatchee, Washington, this 31st day of October, 1928.

A. V. SHEPHARD,
Clerk of the Board. [80]

In the Matter of the Establishment of the CHANGE IN SOUTH LAKE SHORE EXTENSION ROAD, CHELAN COUNTY,

ORDER OF ESTABLISHMENT.

In the Matter of the Establishment of the Change in South Lake Shore Extension Road, Chelan County, the Board finds as follows:

First. That the Resolution therefor was passed on the 30th day of October, 1928, whereby the Board of County Commissioners declared their intention to lay out and establish said road, and the County Engineer was duly directed to examine and if necessary survey the route of said proposed road.

Second. That on the 30th day of October, 1928, the County Engineer filed in the office of the Board his report in writing and at the same time a map and field notes of the proposed road, as provided by law, and the 23d day of November, 1928, was set as the day for hearing on said report, and legal notice of such hearing was duly given.

Third. That said report of the County Engineer shows:

(1) That in his opinion said proposed road is a necessity and ought to be established and opened.

(2) The terminal points, general course and length of road.

(3) His recommendation that said road be established not less than sixty nor more than one hundred feet in width.

(4) A list of persons interested in lands over which said road passes who consented to the establishment of the road and waived all claims to damages.

(5–6) A list of names of persons interested in lands through which the road passes who have not consented to the establishment of the road; and an estimate of the benefits and damages to nonconsenting owners of land by reason of the establishment of said road as follows:

DESCRIPTION OF LAND.				AREA.		NAME OF OWNER.
Part of Section.	Sec.	Tp.	Rg.	Acres.	100ths.	
Lot 3,	3,	27,	21,	1	78	—Margaret Rosborough.
Lot 2,	3,	27,	21,	7	87	—Margaret Rosborough.
[81]						
Lot 1,	3,	27,	21,	2	02	—Margaret Rosborough.
Lot 6,	4,	27,	21,	1	85	—Margaret Rosborough.
SW.¼ SW.¼,	3,	27,	21,		02	—Alice Barbee Wick.
Lot 5,	4,	27,	21,		49	—Alice Barbee Wick.

(7) A description of each tract of land over which said road passes, with the name and place of residence or address of the owners, lessees, claimants or incumbrancers and the quantity of area of land taken from each tract.

(8) That the probable cost of the construction of the road, including all necessary bridges, culverts, and all clearing, grubbing and grading, will be $15,650.00.

(9) That due notice of the time and place of the hearing of the establishment of said road on November 23, 1928, was given in the manner required by law, and the Board having examined the report of the Engineer, the map, and all other papers on file in the proceedings, and heard and considered all testimony and documentary evidence adduced for and against the establishment of the road, and having heretofore by an order duly passed awarded damages in the sum of $1.00 to each of the nonconsenting owners of land through which the right of way passes; and all other persons interested in lands to be taken having previously consented to the establishment of said road and having waived their claims

to damages therefor, and the Board being satisfied that the said road would be of public utility,

IT IS ORDERED BY THE BOARD, all the members concurring, that the Change South Lake Shore Extension road be established as follows:

Commencing at survey station 420+96.5 of South Lake Shore Road as of record, the same being an interior point in Gov't Lot 3, of Sec. 3, Twp. 27 N., Rg. 21, E. W. M., runs thence in a general northwest direction across Gov't Lots 3, 2 and 1 and the SW.¼ of SW.¼ of Sec. 3, Twp. 27 N., [82] Rg. 21, E. W. M., and Gov't Lots 6 and 5 of Sec. 4, Twp. 27 N., Rg. 21, E. W. M., and the SW.¼ of NE.¼ of Sec. 4, Twp. 27 N., Rg. 21, E. W. M., and ends at survey sta. 488+00.9 being an interior point in the SW.¼ of NE.¼ of Sec. 4, Twp. 27 N., Rg. 21, E. W. M., the total length being 1 mile 146 rods and 15.4 feet, and as shown upon the map of the County Engineer, and that from henceforth said road shall be a County Road of sixty feet in width, and that the same be opened according to law.

Done this 23d day of November, 1928.

J. A. WILSON,
W. J. TAYLOR,
Board of Commissioners of Chelan County, Wash.
Attest: A. V. SHEPHARD,
Clerk of Board. [83]

State of Washington,
County of Chelan,—ss.

I, the undersigned Clerk of the Board of County Commissioners of Chelan County, State of Washington, do hereby certify that the foregoing is a

true and correct copy of ALL proceedings before the Board of County Commissioners of Chelan County, Washington, in the matter of the establishment of South Shore Extension Road as of record in this office.

WITNESS my hand and official seal, this 4th day of June, 1930.

A. V. SHEPHARD,

Deputy Auditor and Clerk of the Board of County Commissioners.

[Chelan County
Auditor's
Seal

State of Washington.] [84]

Filed Jun. 23, 1930.

[Title of Court and Cause—No. L.–4501.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF PUBLIC USE AND NECESSITY.

The above-entitled cause came on regularly for trial before the Honorable J. Stanley Webster, Judge of the above-entitled court, upon the application of the petitioner for an order adjudicating public use and necessity; the Court having heretofore considered respondents' special appearance and motion to quash, special appearance and motion to make more definite and certain, special appearance and demurrer, and each of them, and having an-

nounced that the same and each of them would be overruled and denied; petitioner appearing at the hearing on the question of public use and necessity by Sam M. Driver, Deputy Prosecuting Attorney of Chelan County, Washington, respondents failing to appear in person or by attorney, and the Court having duly heard and considered the evidence and being fully advised in the premises, makes the following

FINDINGS OF FACT.

I.

That each and all of the respondents in the above-entitled cause were duly served in the manner prescribed by law with the notice and petition herein, and that this Court has jurisdiction of respondents, and of each and all of them, and of the subject matter of these proceedings. That the respondents are all the owners, encumbrancers and persons or parties interested in the property described in the notice and petition herein. [85]

II.

That at all times herein mentioned the petitioner, Chelan County, Washington, was and now is a duly constituted, organized and existing county and legal subdivision of the State of Washington.

III.

On the 30th day of October, 1928, the Board of County Commissioners of Chelan County, Washington, by unanimous vote, passed a resolution and caused the same to be entered upon the minutes of

said board, declaring that the laying out and establishment of a county road along the south shore of Lake Chelan from a point in the interior of Lot 3, Section 3, Township 27 N., R. 21 E., W. M. at survey station 420 plus 96.5 of South Lake Shore Road as established and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9 an interior point in the SW.¼ NE.¼ of Section 4, Township 27 N., R. 21 E., W. M., being a point of intersection with the Twenty-five Mile Creek Road, —to be a public necessity and declaring the intention of said Board to lay out and establish said road and directing the County Engineer to report upon said project, all in accordance with Chapter 173, Session Laws of Washington, 1925.

IV.

That thereupon the County Engineer made an examination of said proposed road and a survey thereof, and made a report to said Board in writing, as required by law, in which report the County Engineer found, among other things, said proposed road to be practicable and the construction thereof to be a public necessity, and filed with said report a map of the proposed road, as required by law, together with his field notes and profiles of such survey. And that thereafter and on the 30th day of October, 1928, the Board of County Commissioners of Chelan County set the matter of the laying out and establishment of said road and the report of the [86] County Engineer thereon, for hearing on November 23, 1928, at the office of the Board of County Com-

missioners in the courthouse at Wenatchee, Washington, and caused notice of said hearing to be posted and published in the form and for the length of time provided by law.

V.

That on the said 23d day of November, 1928, a public hearing on the laying out and establishment of said road and upon the report of the County Engineer thereon was held by said Board of County Commissioners, and the said Board made and entered its order finding said road to be a public necessity and establishing the said road as a public highway, on the route designated and described in the report of the said County Engineer. It was and is further provided by said order of the Board of County Commissioners on November 23, 1928, that the Prosecuting Attorney for Chelan County be directed to proceed under the power of eminent domain to acquire such lands and other property or property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use, and commence and prosecute to a conclusion condemnation suits for the acquisition of property and rights of way for said new highway as so laid out and established.

VI.

That petitioner has been unable to agree with the respondents for the purchase of the right of way hereinafter described, and in order to construct the said highway upon the route laid out and established by the said Board of County Commissioners, it is

necessary for the petitioner to acquire a right of way for highway purposes, more particularly described as follows, to wit:

A road right of way 60 feet in width over and across Lots 1, 2, and 3 of Section 3, T. 27, N., R. 21 E., W. M., and Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., excepting, however, that part of said right of way that overlaps the SW.¼ of the SW.¼ of said Section 3, all being more particularly described as follows, to wit: [87]

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the north boundary line of said Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description.

Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line: From the initial point, as hereinabove described, run thence S. 35° 11′ E., 76.6 feet; thence on a 6° curve to the left, having a central angle of 19° 29′, a distance of 324.7 feet; thence S. 54° 40′ E., 442.7 feet; thence on a 10° curve to the left, having a central angle of 30° 27′, a distance of 304.5 feet; thence S. 85° 07′ E., 156.1 feet;

thence on a 12° curve to the right, having a central angle of 33° 35′, a distance of 279.9 feet; thence S. 51° 32′ E., 75.1 feet; thence on a 12° curve to the left, having a central angle of 34° 16′, a distance of 285.5 feet; thence S. 85° 48′ E., 61.5 feet; thence on an eight degree curve to the right, having a central angle of 36° 58′ a distance of 462.1 feet; thence S. 48° 50′ E., 290.3 feet; thence on a 6° curve to the left, having a central angle of 47° 01′, a distance of 293.9 feet; thence N. 84° 09′ E., 326.6 feet; thence on a 4° curve to the right having a central angle of 37° 33′, a distance of 938.8 feet; thence S. 58° 18′ E., 656.2 feet; thence on a 6° curve to the left, having a central angle of 7° 19′, a distance of 121.9 feet; thence S. 65° 37′ E., 215.1 feet; thence on a 21° curve to the left, having a central angle of 33° 41′ a distance of 160.4 feet; thence N. 80° 42′ E., 3.5 feet to an interior point in Lot 3, Section 3, T. 27 N., R. 21 E. W. M., the end of this description, which described parcel of land contains 7.53 acres more or less according to survey thereof, not including however, that part of said right of way contained within the SW.¼ of SW.¼ of said Sec. 3.

VII.

That the object for which this proceeding is brought is to ascertain and determine the compensation to be made in money, to the owner or owners, respectively, and to all tenants, encumbrancers and *other interested,* for the taking or injuriously affecting the lands, real estate, premises and other prop-

erty above described in the manner above set forth, and for a release from all liability for all damages to the adjoining lands of the respondents not taken, in any manner arising from the taking of the above-described property and the construction of a public highway thereon.

VIII.

That the object for which said lands, real estate, premises and other property are sought to be appropriated, acquired and injuriously affected by your petitioner is a public object and use, and that the public interest requires the construction of the said highway upon the above-described right of way, and the said lands, real estate, premises and other property sought to be appropriated [88] and injuriously affected are required and necessary for the laying out, establishment and construction of said highway.

IX.

That the following are the names of each and every owner, encumbrancer and person or party interested in the above-described property, or any part thereof, so far as the same can be ascertained from the public records or otherwise, namely, Margaret Rosborough and Alice Barbee Wick.

X.

That in order to acquire title to said property above described, it is necessary for the petitioner to condemn said property and to acquire the same for the public purposes aforesaid by appropriate proceedings under and by virtue of the power of emi-

nent domain conferred upon the petitioner in common with other like corporations in and by the laws of the State of Washington, and the petitioner has made said petition for said purposes.

Pursuant to the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW.

That the public interest requires the prosecution of the enterprise of the petitioner, and that the land, real estate and premises sought to be appropriated in the above-entitled cause is required and necessary for the purpose of the construction of said public highway.

ORDER.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the contemplated use for which the lands, real estate and premises herein are sought to be appropriated is a public use, and that the public interest requires the construction of the highway mentioned in said petition, and that the lands, real estate and premises herein sought to be appropriated and the interest of the above-named respondents [89] therein to the extent herein provided, is required and necessary for the purpose of the construction of said highway, and that said petitioner is entitled to take said lands, real estate and premises and the interest of the respondents therein to the extent herein provided, for a right of way for highway purposes, under and by virtue of the power of eminent domain upon the

payment of just compensation to the respondents herein, to be determined according to law.

The lands, real estate and premises, and the interest in the lands, real estate and premises hereby authorized to be taken as a right of way for highway purposes are more particularly described as follows, to wit:

A road right of way 60 feet in width over and across Lots 1, 2, and 3 of Section 3, T. 27, N., R. 21 E., W. M., and Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., excepting, however, that part of said right of way that overlaps the SW.¼ of the SW.¼ of said Section 3, all being more particularly described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the north boundary line of said Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description.

Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line: From the initial point, as hereinabove described, run thence S. 35° 11′ E., 76.6 feet; thence on a 6° curve to the left, having a central angle of 19° 29′, a

distance of 324.7 feet; thence S. 54° 40′ E., 442.7 feet; thence on a 10° curve to the left, having a central angle of 30° 27′, a distance of 304.5 feet; thence S. 85° 07′ E., 156.1 feet; thence on a 12° curve to the right, having a central angle of 33° 35′, a distance of 279.9 feet; thence S. 51° 32′ E., 75.1 feet; thence on a 12° curve to the left, having a central angle of 34° 16′, a distance of 285.5 feet; thence S. 85° 48′ E., 61.5 feet; thence on an eight degree curve to the right, having a central angle of 36° 58′, a distance of 462.1 feet; thence S. 48° 50′ E., 290.3 feet; thence on a 6° curve to the left, having a central angle of 47° 01′, a distance of 293.9 feet; thence N. 84° 09′ E., 326.6 feet; thence on a 4° curve to the right, having a central angle of 37° 33′, a distance of 938.8 feet; thence S. 58° 18′ E., 656.2 feet; thence on a 6° curve to the left, having a central angle of 7° 19′, a distance of 121.9 feet; thence S. 65° 37′ E., 215.1 feet; thence on a 21° curve to the left, having a central angle of 33° 41′, a distance of 160.4 feet; thence N. 80° 42′ E., 3.5 feet to an interior point in Lot 3, Section 3, T. 27 N., R. 21 E. W. M., the end of this description, which described parcel of land contains 7.53 acres more or less according to survey thereof, not including however, that part of said right of way contained within the SW.¼ of SW.¼ of said Sec. 3.

Done in open court this 23d day of June, 1930.

J. STANLEY WEBSTER,
Judge. [90]

Filed Nov. 20, 1930.

[Title of Court and Cause—No. L.–4501.]

VERDICT.

We, the jury in the above-entitled cause, find for the respondents in the sum of $700.00.

W. W. GOFF,
Foreman. [91]

Filed Dec. 15, 1930.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. L.–4501.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Respondents.

JUDGMENT ON VERDICT.

This cause coming on regularly for trial before the above-entitled court, Honorable J. Stanley Webster, Judge thereof, and before a jury, at the courtroom of the above-entitled court in the city of Spokane, State of Washington, the petitioner appearing by its attorney, J. A. Adams, and the respondents Alice Barbee Wick and Margaret Rosborough

failing to appear in person or by attorney, and it appearing to the Court that an order adjudicating public use and necessity has heretofore been entered herein, and a jury having been sworn to try the issues of the case and having returned its verdict making an assessment of damages to the respondents herein by reason of the appropriation and use of the property described in the petition herein, and the Court being satisfied by proof that all parties interested in the land and premises described in the petition of the petitioner and hereinafter described, have been served with notice herein as required by law, and being further satisfied by competent proof that the contemplated use for which said land, real estate, premises or other property is sought to be appropriated is a public use, namely: a right of way for the county road and public highway described in the petition herein, which road has been duly and regularly established by proper proceedings by and before the County Commissioners of Chelan County, Washington, and the Court having accordingly made and entered herein its Order of Adjudication of Public Use and Necessity for appropriation,—

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that just compensation be paid by Chelan County, Washington, to the owners of said [92] property, and to all tenants, encumbrancers and other interested, for the taking and injuriously affecting such land, real estate and premises, in the sum of Seven Hundred Dollars ($700.00), with costs to the respondents in the sum of $———.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said respondents Margaret Rosborough and Alice Barbee Wick do have and recover from Chelan County, Washington, said sum for the taking and appropriating of the lands, real estate and premises for the uses set forth in the petition on file herein, and upon payment by said Chelan County, Washington, of said just compensation and damages to the respondents, or upon depositing the same for the use and benefit of the respondents with the Clerk of the above-entitled court to be paid out under the direction of said court or the Judge thereof, that the property hereinafter described, and the title thereto, free and clear of any and all encumbrances of any nature whatsoever, shall pass to and become vested in Chelan County, Washington, a municipal corporation.

The property, and title thereto, for a right of way for highway purposes hereby condemned and appropriated to the use of said Chelan County, Washington, are situated in said Chelan County, State of Washington, and particularly described as follows:

> A road right of way 60 feet in width over and across Lots 1, 2 and 3 of Section 3, T. 27 N., R. 21 E., W. M., and Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., excepting, however, that part of said right of way that overlaps the SW.¼ of the SW.¼ of said Section 3, all being more particularly described as follows, to wit:
>
> Tying to the section corner common to Sec-

tions 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the north boundary line of said Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line: From the initial point, as hereinabove described, run thence S. 35° 11′ E., 76.6 feet; thence on a 6° curve to the left, having a central angle of 19° 29′, a distance of 324.7 feet; thence S. 54° 40′ E., 442.7 feet; thence on a 10° curve to the left, having a central angle of 30° 27′, a distance of 304.5 [93] feet; thence S. 85° 07′ E., 156.1 feet; thence on a 12° curve to the right, having a central angle of 33° 35′, a distance of 279.9 feet; thence S. 51° 32′ E., 75.1 feet; thence on a 12° curve to the left, having a central angle of 34° 16′, a distance of 285.5 feet; thence S. 85° 48′ E., 61.5 feet; thence on an 8° curve to the right, having a central angle of 36° 58′, a distance of 462.1 feet; thence S. 48° 50′ E., 290.3 feet; thence on a 6° curve to the left, having a central angle of 47° 01′, a distance of 293.9 feet; thence N. 84° 09′ E., 326.6 feet; thence on a 4° curve to the right, having a central angle of 37° 33′, a distance of 938.8 feet; thence S. 58° 18′ E., 656.2 feet; thence on a 6° curve to the left, having a

central angle of 7° 19′, a distance of 121.9 feet; thence S. 65° 37′ E., 215.1 feet; thence on a 21° curve to the left, having a central angle of 33° 41′, a distance of 160.4 feet; thence N. 80° 42′ E., 3.5 feet to an interior point in Lot 3, Section 3, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 7.53 acres more or less according to survey thereof, not including, however, that part of said right of way contained within the SW.¼ of the SW.¼ of said Section 3.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon such payment being made by said Chelan County, Washington, a decree of appropriation shall be entered in accordance herewith and releasing said Chelan County, Washington, from any and all liability to the respondents and to any and all persons having or claiming to have any interest in and to the property described herein, for any and all damages to the lands and property above described, and to any and all lands lying contiguous or adjacent to said lands hereinabove described, in any manner arising from or to grow out of the taking of the property herein described, or the laying out, establishing, construction, maintenance, or operation of a public highway thereon, and that said Chelan County, Washington, shall be and become the owner of the said above-described tract or parcel of land, real estate and premises for the purpose of constructing, maintaining and operating a public highway thereon, and shall be entitled to enter into possession of the same for

said purposes and that such payment as herein ordered and directed shall be payment in full for the taking, condemnation, appropriation and use of the same.

Done in open court this 15th day of December, 1930.

J. STANLEY WEBSTER,
Judge. [94]

[Title of Court and Cause—No. L.–4501.]

MEMO. IN ACCORDANCE WITH ITEM 13 OF APPELLANT'S PRAECIPE.

Chelan County Warrant in the sum of $730.00 received by the Clerk U. S. District Court, December 1, 1930.

Said sum credited on the books of the Clerk U. S. District Court, in the above-entitled cause, December 26, 1930. [95]

Filed Dec. 15, 1930.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. L.–4501.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Respondents.

DECREE OF APPROPRIATION.

This cause coming on regularly for hearing upon the application of petitioner herein for a decree of appropriation of the property mentioned in the petition on file herein, and it appearing to the Court that heretofore a verdict was duly rendered in the above-entitled cause in favor of respondents, Margaret Rosborough and Alice Barbee Wick, in the sum of Seven Hundred ($700.00) Dollars and that thereafter a judgment was duly and regularly entered upon said verdict in favor of the respondents and against the petitioner in said sum, and costs; and it further appearing to the Court that said petitioner has heretofore deposited with the Clerk of the above-entitled court the said sum of Seven Hundred Dollars ($700.00) and Thirty Dollars ($30.00) taxed as costs for the benefit of said respondents to be paid out under the direction of this court or the judge thereof,—

Now, on motion of J. A. Adams, attorney for the petitioner, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there is hereby appropriated and granted to and vested in the above-named petitioner Chelan County, Washington, a municipal corporation, for its corporate purposes, a right of way for highway purposes in and to the following described property, lands, and premises, situate in the County of Chelan, State of Washington, to wit:

A road right of way 60 feet in width over and across Lots 1, 2, and 3 of Section 3, T. 27

N., R. 21 E., W. M., and Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., excepting, however, that part of said right of way that overlaps the SW.¼ of the SW.¼ of said Section 3, all being more particularly described as follows, to wit: [96]

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the north boundary line of said Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line. From the initial point, as hereinabove described, run thence S. 35° 11′ E., 76.6 feet; thence on a 6° curve to the left, having a central angle of 19° 29′ a distance of 324.7 feet; thence S. 54° 40′ E., 442.7 feet; thence on a 10° curve to the left, having a central angle of 30° 27′, a distance of 304.5 feet; thence S. 85° 07′ E., 156.1 feet; thence on a 12° curve to the right, having a central angle of 33° 35′, a distance of 279.9 feet; thence S. 51° 32′ E., 75.1 feet; thence on a 12° curve to the left, having a central angle of 34° 16′, a distance of 285.5 feet; thence S. 85° 48′ E., 61.5 feet; thence on an 8° curve to the right, having a central angle of 36° 58′, a

distance of 462.1 feet; thence S. 48° 50′ E., 290.3 feet; thence on a 6° curve to the left, having a central angle of 47° 01′, a distance of 293.9 feet; thence N. 84° 09′ E., 326.6 feet; thence on a 4° curve to the right, having a central angle of 37° 33′, a distance of 938.8 feet; thence S. 58° 18′ E., 656.2 feet; thence on a 6° curve to the left, having a central angle of 7° 19′, a distance of 121.9 feet; thence S. 65° 37′ E., 215.1 feet; thence on a 21° curve to the left, having a central angle of 33° 41′, a distance of 160.4 feet; thence N. 80° 42′ E., 3.5 feet to an interior point in Lot 3, Section 3, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 7.53 acres more or less according to survey thereof, not including, however, that part of said right of way contained within the SW.¼ of the SW.¼ of said Section 3.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Chelan County, Washington, a municipal corporation, be and it is hereby released from any and all liability to the respondents herein and to any and all persons having or claiming to have any interest in and to the property described herein, or lying contiguous or adjacent thereto, for any and all damages in any manner arising from and to grow out of the taking of said property or the laying out, establishment, construction, maintenance or operation of a public highway thereon. That said Chelan County, Washington, a municipal corporation, is entitled to enter into the

immediate possession of said property, and that the said payment hereinabove referred to is and shall constitute full compensation for the taking, condemnation, appropriation, and use of the property, lands and premises herein described.

Done in open court this 15th day of December, 1930.

J. STANLEY WEBSTER,
Judge. [97]

Filed Mar. 5, 1931.

[Title of Court and Cause—No. L.–4501.]

SUBSTITUTION OF ATTORNEYS.

To the Clerk of the Above-entitled Court:

Enter our appearence as attorneys of record for respondents in the above-entitled cause, reserving special appearance heretofore made herein.

Dated at Spokane, Washington, March 5th, 1931.

BERKEY & COWAN,
Attorneys for Defendants.
P. O. Address: 204–6 Wall St.,
Bank Bldg., Spokane, Washington. [98]

Filed Mar. 5, 1931.

[Title of Court and Cause—No. L.–4501.]

PETITION FOR LEAVE OF COURT TO FILE MOTION FOR NEW TRIAL.

To the Honorable J. STANLEY WEBSTER, Judge of the Above-entitled Court:

Comes now the respondents by their counsel, Messrs. Berkey & Cowan, and still reserving their special appearance herein, respectfully request this Honorable Court to grant them leave to file a motion for a new trial of the above-entitled cause.

This petition will be based upon the records and files in the above-entitled cause and upon the affidavit of Chas. F. Cowan, one of defendants' attorneys, hereto attached and made a part hereof.

BERKEY & COWAN,
Attorneys for Defendants,
P. O. Address: 204–6 Wall St.,
Bank Bldg., Spokane, Washington. [99]

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

Chas. F. Cowan, being first duly sworn on oath, says: That affiant is one of the attorneys of record for the defendants in the above-entitled action, substitution of said attorneys of record having been made on March 5th, 1931. That J. D. Campbell, the former attorney of record for said defendants, died on or about January 10, 1930. That affiant was not employed to represent said defendants in the above cause until February 28th, 1931, and after the time fixed by rule of this court within which to file motion for a new trial, but within the term and within three months from the date of the entry of judgment in said cause, all of which will more fully appear by the records and files herein.

CHAS. F. COWAN.

Subscribed and sworn to before me this 5th day of March, 1931.

[Seal] JAMES A. LYBECKER,
Notary Public in and for Said County and State,
Residing at Spokane, Wash. [100]

Filed Mar. 6, 1931.

[Title of Court and Cause—No. L.–4501.]

ORDER DENYING MOTION FOR LEAVE TO FILE MOTION FOR NEW TRIAL.

This matter coming on for hearing upon the petition of Messrs. Berkey & Cowan, attorneys for respondents, for leave to file a motion for new trial of the above-entitled cause, and the Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED, That said motion be, and the same is hereby denied, to which respondents except and their exceptions are hereby allowed.

Dated this 6th day of March, 1931.

J. STANLEY WEBSTER,
Judge of the United States District Court. [101]

Filed Mar. 10, 1931.

[Title of Court and Cause—No. L.-4501.]

PETITION FOR APPEAL AND ORDER GRANTING SAME.

To Chelan County, Washington, a Municipal Corporation, and to J. A. Adams and Sam M. Driver, Attorneys for Appellee:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, That Margaret Rosborough and Alice Barbee Wick, respondents in the above-entitled cause hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the verdict of the jury awarding damages, judgment of the Court thereon, and decree of appropriation, entered in the above-entitled cause on December 15th, 1930, and from the whole thereof.

That your petitioners file herewith their assignments of error based upon the record and intended to be urged by them on this, their appeal.

That your petitioners pray that their said appeal be granted and allowed and that citation issue herein as provided by law and that an order be made fixing the amount of the bond to be given by your petitioners upon appeal; and that a transcript of the record, proceedings [102] and papers, upon which said order, verdict and judgment were made and entered, duly authenticated, may be sent to the

United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

MARGARET ROSBOROUGH and
ALICE BARBEE WICK,
Appellants.

By BERKEY & COWAN,
Their Attorneys.

P. O. Address: 204–6 Wall St. Bank Bldg.,
Spokane, Washington.

District of Washington,
County of Chelan,—ss.

Service of the within petition for appeal is hereby acknowledged in Wenatchee, Washington, in said District, this 7th day of March, 1931, by the receipt of a copy thereof.

J. A. ADAMS,
SAM M. DRIVER,
Attorneys for Chelan County, Washington, Petitioner.

The petition granted, and the appeal allowed upon respondents giving bond conditioned as required by law in the sum of $500.00.

Dated at Spokane, Washington, March 10, 1931.

J. STANLEY WEBSTER,
Judge of the United States District Court. [103]

Filed Mar. 10, 1931.

[Title of Court and Cause—No. L.–4501.]

ASSIGNMENTS OF ERROR.

Margaret Rosborough and Alice Barbee Wick, respondents in the above-entitled action, by Messrs. Berkey & Cowan, their attorneys, having filed notice of appeal as provided by law that the respondents appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the verdict of the jury, judgment and decree of appropriation rendered thereon, on the 15th day of December, 1930, now make and file in support of said appeal the following assignment of errors, upon which they will rely for reversal thereof:

I.

WANT OF JURISDICTION.

1. That the Court has no jurisdiction over the persons or property of the respondents, for the reason that the requirement of a once a week for two consecutive weeks' publication of notice against nonresident owners in condemnation proceedings, by Acts approved March 21, 1890, page 294, and being Section 7647 of Pierce's Code of the State of Washington, is inadequate and confiscatory and contrary to the Constitution of the United States, and particularly paragraph I of the 14th Amendment thereof. [104]

II.

THAT THE PROPERTY OF RESPONDENTS IS BEING TAKEN WITHOUT DUE PROCESS OF LAW.

1. That the notice of petitioner's motion to have said case set for trial on Monday, May 26th, 1930, at 10:00 o'clock A. M. was received by respondents by mail at Philadelphia, Pennsylvania, on May 23d, 1930, thereby giving respondents insufficient time to appear, or to be represented thereat.

2. That the only notice of hearing for order of necessity was by registered mail and not received by respondents at Philadelphia, Pennsylvania, until May 31st, 1930, stating said cause had been set for hearing on June 5th, 1930, at 10:00 o'clock A. M. and did not give respondents sufficient time to appear and defend the same.

3. That notice of trial was likewise served upon respondents by mail, the same being received by respondents at Philadelphia, Pennsylvania, on November 3d, 1930, stating that said case had been set for trial on November 20th, 1930, at 10:00 o'clock A. M., which did not give respondents sufficient time to prepare for trial and defend said cause.

4. That said notices were also served upon one Adrian W. Vollmer, who was not an attorney of record for these respondents, or either of them, and who did not reside at Lakeside, Washington, as stated in said notices, and did not in anywise represent respondents.

III.

That the Court erred in denying respondents'

motion to quash and in refusing to hold the following statutes of the State of Washington, void, as depriving respondents (now appellants) of due process of law secured by Paragraph I of the Fourteenth Amendment of the Constitution of the United States, to wit: Acts approved March 13th, 1899, Chapter 94, p. 147, particularly Section I, p. 147; March 17, 1903, Chapter 173, [105] p. 360, particularly Section 2, p. 362; March 15, 1907, Chapter 159, p. 349, particularly Section I, p. 349.

IV.

That the Court erred in denying appellants' motion to make more definite and certain, or in the alternative for a bill of particulars.

V.

That the Court erred in overruling appellants' demurrer.

VI.

INSUFFICIENCY OF THE RECORD TO JUSTIFY THE VERDICT AND THE JUDGMENT AND DECREE RENDERED THEREON AND THAT THE SAME IS AGAINST LAW.

1. That the Commissioners' proceedings, upon which the verdict and judgment are based, are fatally defective and incomplete as shown by the record in this case.

2. That no showing is made in said Commissioners' proceedings, or the surveyors' report that any offer or statements of damages was made to re-

spondents, or either of them, prior to commencement of Condemnation Proceedings.

3. That it appears from Engineers' report, that the survey for the road was made on April 27th and April 28, May 12, 21, 22, June 22 and July 3, 1928, which was prior to and not in pursuance of the order of the County Commissioners directing such survey on October 30th, 1928, and as required by Chapter 173, Laws of 1925, and more particularly Section 3 thereof, of the laws of the State of Washington.

4. That the Commissioners' proceedings do not show that the prosecuting attorney was ordered to commence condemnation proceedings as provided for by Chapter 173, of the Laws of 1925, and more particularly Section 5 thereof of the laws of the State of Washington.

5. That the Commissioners' proceedings were not signed and [106] sealed by the County Commissioners, and attested by their Clerk, as required by Laws 1893, and on page 252 thereof, and approved March 10, 1893, and particularly Section 1663, of Pierce's Code of the State of Washington.

6. That the lands sought to be taken by the decree of appropriation are incorrectly described, and vary from the surveyor's plat and field notes thereof on file herein.

7. That the description of the lands sought to be taken by the condemnation proceedings and decree of appropriation differ from and are at variance with the published notice of hearing on change on South Lake Shore Extension Road dated October 31, 1928.

8. That the award of damages was not paid in to the Clerk of the court prior to the entry of decree of appropriation, and as provided for therein, and contrary to the provisions of Article 1, Section 16 of the Constitution of the State of Washington.

9. That no segregation or separate statement of damages was made to respondents in the verdict or judgment thereon for their respective lands taken or damaged.

VII.

That the Court erred in entering a judgment on the verdict which purports to convey the fee to the road in question, rather than an easement for road purposes, as authorized by the provisions of Chapter 173 of the Laws of 1925, approved Jan. 15, 1926.

Dated at Spokane, in said Eastern District of Washington, this 6th day of March, 1931.

BERKEY & COWAN,
Attorneys for Respondents.
P. O. Address: 204–6 Wall St. Bk. Bldg.,
Spokane, Washington. [107]

District of Washington,
County of Chelan,—ss.

Service of the within assignment of errors is hereby acknowledged in Wenatchee, Washington, in said District, this 7th day of March, 1931, by the receipt of a copy thereof.

J. A. ADAMS,
SAM M. DRIVER,
Attorneys for Chelan County, Washington, Appellee. [108]

Filed Mar. 23, 1931.

[Title of Court and Cause—No. L.–4501.]

AMENDED AND SUPPLEMENTAL ASSIGNMENTS OF ERROR.

Come now the respondents and present the following additional assignments of error in support of their appeal herein, and herewith request the Clerk to include the same in the transcript of the record on appeal.

VIII.

That the Court erred in refusing respondents' motion to quash and to set aside the pretended notice of filing and of hearing of the petition in condemnation; said motion being upon the ground, *inter alia,* that the condemnation statutes of the State of Washington, upon which these condemnations proceedings were based, particularly that portion thereof (Session Laws of 1890, p. 295, Sec. 2, Pierce's Code, Section 7646) relating to notice and service upon nonresident owners is inadequate as to manner and time, and without due process of law, and is thus and otherwise contrary to Sections 3 and 16 of Article I, of the Constitution of the State of Washington, and the Fourteenth Amendment to the Constitution of the United States. [109]

IX.

That the Court erred in refusing to hold that certain eminent domain statute of the State of Washington, entitled by an Act to regulate the mode of proceeding to appropriate lands by Corporations,

approved March 21, 1890, Laws of 1890, p. 294, and laws amendatory thereof, are contrary to Sections 2, 3 and 16 of Article I of the Constitution of the State of Washington, and Section 2, Article VI, and the Fourteenth Amendment of the Constitution of the United States.

X.

That the Court erred in refusing to hold that the eminent domain statutes of the State of Washington are contrary to the provisions of the Constitution of the State of Washington, and the Constitution of the United States, and the amendments thereto, and deny to these respondents their constitutional rights guaranteed to them thereunder.

XI.

That the Court erred in holding that the taking of respondents' lands was for a public use and the entering of an order of necessity therein, and the same is contrary to respondents' rights under the Fourteenth Amendment of the Constitution of the United States.

XII.

That there is nothing in the record of the above-entitled cause, showing that jurisdiction was acquired over respondent, Alice Barbee Wick, either by personal service, or by description of any property belonging to her.

XIII.

That the Court erred in refusing respondents leave to file their motion for a new trial, because the same was tendered within the term, and within three months from the entry of judgment. [110]

XIV.

That the pretended service of notice upon one Adrian W. Vollmer was void and of no effect, for the reason that said Adrian W. Vollmer was not an attorney of record for respondents, or either of them, that he was not personally served with process or notice, and did not reside at Lakeside, Washington, and was not a resident of the State of Washington, and had not even visited therein, for a period of 23 months prior thereto.

For these errors, and the errors contained in the original assignments of error, these appellants pray that the order of necessity, judgment on the verdict, and the decree of appropriation, entered in the above-entitled cause be reversed and set aside, and a judgment rendered in favor of appellants, and for their costs.

BERKEY & COWAN,
Attorneys for Appellants,
P. O. Address: 204–6 Wall St. Bk. Bldg.,
Spokane, Washington.

State of Washington,
County of Spokane,—ss.

Chas. F. Cowan, being first duly sworn on oath deposes and says: That I am one of the attorneys for appellants in the above-entitled cause, a citizen of the United States and of the State of Washington, above the age of twenty-one years: That I served the within amended and supplemental assignments of error in the above-entitled cause upon the appellee, Chelan County, Washington, a municipal corporation, on the 23d day of March, 1931, by de-

positing a true copy thereof properly sealed in an envelope for transmission thru the mail with postage fully prepaid thereon addressed to attorneys, J. A. Adams and Sam M. Driver, Wenatchee, Washington, the attorneys of record for said appellee on said 23d day of March, 1931, and that there is a regular mail communication between said Spokane, Washington, and said Wenatchee, Washington.

CHAS. F. COWAN.

Subscribed and sworn to before me this 23d day of Mar., 1931.

[Notary Seal] R. E. PORTERFIELD,
Notary Public, Residing at Spokane, Washington.

[111]

Filed Mar. 10, 1931.

[Title of Court and Cause—No. L.-4501.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Margaret Rosborough and Alice Barbee Wick, appellants above, as principal, and United States Fidelity & Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized to transact business in the State of Washington, and fully qualified to execute bonds and undertakings in any and all federal courts of the United States of America, as surety, are held and firmly bound unto Chelan County, appellee, its successors and assigns, in the full and just sum of Five Hundred

($500.00) Dollars, for the payment of which sum, well and truly to be made, the principals hereby bind themselves, their heirs, administrators, executors, and the said surety company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this sixth day of March, A. D. 1931.

WHEREAS, in the District Court of the United States in and for the Eastern District of Washington, Northern Division, in a proceeding in said court between Chelan County, Washington, a municipal corporation, as petitioner, and Margaret Rosborough and Alice Barbee Wick, as respondents, a judgment and decree were entered in favor of said petitioner and against the said respondents, on the 15th day of December, 1930, and the said [112] Margaret Rosborough and Alice Barbee Wick, appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit:

NOW, THEREFORE, the condition of the above obligation is such that if the said appellants shall prosecute their appeal to effect and answer all costs, if they fail to make their plea good, then the above obligation is void; else to remain in full force and virtue.

MARGARET ROSBOROUGH. (Seal)
ALICE BARBEE WICK. (Seal)
UNITED STATES FIDELITY AND GUARANTY COMPANY.
By GUY E. FRANKENFIELD,
Attorney-in-fact.

[Corporate Seal] Attest: ————————.

This bond is approved as to form, amount and sufficiency of surety, this 10th day of March, 1931.

J. STANLEY WEBSTER,
United States District Judge. [113]

Filed Mar. 12, 1931.

[Title of Court and Cause—No. L.–4501.]

CITATION ON APPEAL.

United States of America,—ss.

To Chelan County, Washington, a Municipal Corporation, and to J. A. Adams and Sam W. Driver, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Eastern District of Washington, Northern Division, wherein the respondents in the above-entitled cause are appellants, and you as petitioner in said cause, are appellee, to show cause, if any there be, why verdict, judgment and decree mentioned in said appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable J. STANLEY WEBSTER, the United States District Judge, this 10th day of March, 1931.

J. STANLEY WEBSTER,
United States District Judge. [114]

District of Washington,
County of Chelan,—ss.

Service of the within citation on appeal is hereby acknowledged in Wenatchee, Washington, in said District, this 11th day of March, 1931, by the receipt of a copy thereof.

J. A. ADAMS,
SAM M. DRIVER,
Attorneys for Chelan County, Washington, Appellee. [115]

Filed Mar. 12, 1931.

[Title of Court and Cause—No. L.-4501.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please make up and certify to the Circuit Court of Appeals, Ninth Judicial Circuit, the following papers and records in the above-entitled cause, together with maps of surveys.

1. Appellants' transcript.
2. Special appearance and motion to quash.
3. Order denying motion to quash.
4. Demurrer, preserving special appearance.
5. Motion to make more definite and certain, etc.
6. Order denying motion and bill of particulars, and overruling demurrer.

6½. Motion for setting case.

7. Proofs of mailing notices of hearings and trial.

8. Affidavit of Adrian Winston Vollmer and affidavit of mailing.
9. Transcript of Commissioners' proceedings.
10. Findings of fact, conclusions of law, and order of public necessity.
11. Verdict.
12. Judgment on verdict. [116]
13. Date of Clerk's receipt of award.
14. Decree of appropriation.
15. Substitution of attorneys.
16. Petition for leave to file motion for new trial.
17. Order denying same.
18. Petition for appeal and order allowing same.
19. Assignment of errors.
20. Bond on appeal and approval thereof.

20½. Citation.

21. This praecipe.
22. Name and P. O. address of attorneys.
23. Index.

BERKEY & COWAN,
Attorneys for Appellants.
P. O. Address: 204–6 Wall St. Bk. Bldg.,
Spokane, Washington.

District of Washington,
County of Chelan,—ss.

Service of the within praecipe for transcript of record is hereby acknowledged in Wenatchee, Washington, in said District, this 11th day of March, 1931, by the receipt of a copy thereof.

J. A. ADAMS,
SAM M. DRIVER,
Attorneys for Chelan County, Washington, Appellee. [117]

Filed Mar. 18, 1931.

[Title of Court and Cause—No. L.–4501.]

AMENDED PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will include in the record of the above-entitled cause, the stipulation of the attorneys for the respective parties with reference to statement of evidence and praecipe on appeal, together with the original citation on appeal.

BERKEY & COWAN,
Attorneys for Appellants.

State of Washington,
County of Spokane,—ss.

Chas. F. Cowan, being first duly sworn on oath, deposes and says: That I am one of the attorneys for appellants in the above-entitled cause, a citizen of the United States and of the State of Washington, above the age of twenty-one years: That I served the within amended praecipe in the above-entitled cause upon the appellee, Chelan County, Washington, a municipal corporation, on the 18th day of March, 1931, by depositing a true copy thereof properly sealed in an envelope for transmission thru the mail with postage fully prepaid thereon addressed to attorneys, J. A. Adams and Sam M. Driver, Wenatchee, Washington, the attorneys of record for said appellee on said 18th day of March, 1931, and that there is a regular mail

communication between said Spokane, Washington, and said Wenatchee, Washington.

CHAS. F. COWAN.

Subscribed and sworn to before me this 18th day of Mar., 1931.

[Seal] CHAS. B. VAN LIEU,

Notary Public, Residing at Spokane, Washington.

[118]

Filed Mar. 17, 1931.

[Title of Court and Cause—No. L.–4501.]

STIPULATION RE STATEMENT OF EVIDENCE.

IT IS HEREBY STIPULATED by and between J. A. Adams and Sam M. Driver, attorneys for petitioner, and Berkey & Cowan, attorneys for respondents, that the original statements of evidence in the above-entitled cause may be sent by the Clerk of the United States District Court for the Eastern District of Washington, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, without requiring the same to be printed.

IT IS FURTHER STIPULATED that the statement of evidence on order of necessity may be used jointly in cases Number L.–4501 and L.–4502.

IT IS FURTHER STIPULATED that for the purpose of appeal, that said causes Number L.–4501 and L.–4502 may be heard together, and the briefs in one case shall be considered in both, with-

out the requirement of printing and filing separate briefs in each cause.

J. A. ADAMS,
SAM M. DRIVER,
Attorneys for Petitioner,
P. O. Wenatchee, Washington.
BERKEY & COWAN,
Attorneys for Respondents,
P. O. Spokane, Washington. [119]

[Title of Court and Cause—No. L.–4501.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, W. S. Coey, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages, numbered from 1 to 119 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above-entitled cause, as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals, as called for by the appellants in their praecipes, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment and decree of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Ap-

peals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause, and the original statements of evidence as referred to in the stipulation filed on the 17th day of March, 1931.

I further certify that the cost of preparing and [120] certifying the foregoing transcript is the sum of Twenty-one and 65/100 ($21.65) Dollars, and that the said sum has been paid to me by Messrs. Berkey & Cowan, attorneys for respondents, and appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 27 day of March, 1931.

[Seal] W. S. COEY,
Clerk. [121]

[Endorsed]: No. 6429. United States Circuit Court of Appeals for the Ninth Circuit. Margaret Rosborough and Alice Barbee Wick, Appellants, vs. Chelan County, Washington, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed April 6, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6430

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, His Wife (True Christian Name Unknown),

Appellants,

vs.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6430

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ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, His Wife (True Christian Name Unknown),

Appellants,

vs.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. J. A. ADAMS, Mr. SAM M. DRIVER, Commercial Bank Bldg., Wenatchee, Washington,
Attorneys for Complainant and Appellee.

Messrs. BERKEY & COWAN, 204–6 Wall St. Bank Bldg., Spokane, Washington,
Attorneys for Respondents and Appellants*.

In the Superior Court of the State of Washington, in and for the County of Chelan.

No. 8792.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,
Petitioner,

vs.

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, His Wife (True Christian Name Unknown),
Respondents.

NOTICE RE CONSTRUCTION OF PUBLIC HIGHWAY.

The State of Washington, to Theodore S. Tettemer and Jane Doe Tettemer, His Wife (True Christian Name Unknown), and Alice Barbee Wick, Respondent:

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*Page-number appearing at the foot of page of original certified Transcript of Record.

YOU ARE HEREBY NOTIFIED that the petitioner, Chelan County, Washington, a municipal corporation, has filed in this above-entitled court, with the Clerk thereof, a petition showing that the Board of County Commissioners of Chelan County has entered an order declaring the construction of a public highway along the south shore of Lake Chelan from a point in the interior of Lot 3, Section 3, Township 27 N., R. 21 E., W. M., at survey station 420 plus 96.5 of south Lake Shore Road as established and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9, an interior point in the SW.¼ NE.¼ of Section 4, Township 27 N., R. 21 E., W. M., being a point of intersection with the Twenty-five Mile Creek Road, to be a public necessity and has laid out and established the said highway in accordance with provisions of Chapter 173, Session Laws of Washington, 1925; and has ordered the Prosecuting Attorney of Chelan County to proceed under the power of eminent domain to acquire such lands and other property and property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use; and in order to construct the said highway upon the route laid out and established by the said Board of County [2] Commissioners, it is necessary for the petitioner to acquire a right of way for highway purposes over and across lands and premises owned by respondent and more particularly described as follows, to wit:

A road right of way 60 feet in width over and across Lot 5, Section 4, T. 27 N. R. 21 E. W. M., particularly located and described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N. R. 21 E. W. M. and run thence N. 0 degrees 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85 degrees 07′ W., 351.3 feet; thence N. 54 degrees 40′ W., 762.7 feet; thence N. 35 degrees 11′ W., 240.6 feet more or less to the south boundary line of said Lot 5 of Section 4, T. 27 N., R. 21 E. W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line. From the initial point, as hereinabove described, continue thence N. 35 degrees 11′ W., 30 feet; thence on a 2 degree curve to the left having a central angle of 6 degrees 28′ a distance of 323.5 feet more or less to the west line of said Lot 5 of Section 4, T. 27 N. R. 21 E. W. M., the end of this description, which described parcel of land contains 0.49 acre more or less.

Also, a road right of way over and across the northeast corner of the SW.¼ of the SW.¼ of Section 3, T. 27 N. R. 21, E. W. M., being only that part of the right of way of the South Lake Shore Extension Road that overlaps the said SW.¼ of the SW.¼ of said

Section 3, and being more particularly located and described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N. R. 21 E. W. M., and run thence N. 0 degrees 44′ E., following the section line between said Sections 3 and 4 a distance of 1976.6 feet; thence S. 85 degrees 07′ E. 240.7 feet; thence S. 51 degrees 32′ E., 640.5 feet; thence S. 85 degrees 48′ E., 809.1 feet; thence S. 48 degrees 50′ E., 752.4 feet; thence on a 6 degree curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW.¼ of the SW.¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running south from the initial point as hereinabove described, following the east boundary line of said SW.¼ of the SW.¼ of Section 3, to a point 30 feet distant from the survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a curve having a radius of 985 feet, being parallel and 30 feet distant from survey alignment curve at this place, to the north boundary line of said SW.¼ of the SW.¼ of Section 3; thence east following the north boundary line of said SW.¼ of the SW.¼ of Section 3, to the initial point and place of beginning, which described parcel of land contains 0.02 acre more or less.

The object of said proceeding is to ascertain and determine the compensation to be made in money to the owner or owners, respectively, and to all tenants, encumbrancers and others interested, [3] for the taking or injuriously affecting the lands, real estate and premises above described, in the manner set forth in said petition, and for a release from all liability for all damages to the adjoining lands of the respondent not taken, in any manner arising from the taking of the above-described property and the construction of a public highway thereon, and to obtain a decree that the contemplated use for which said lands, real estate, premises and other property are sought to be appropriated is a public object and use and that the public interest requires the laying out, establishment and construction of said highway, and that said lands, real estate, premises and other property sought to be appropriated and injuriously affected are required and necessary for the laying out, establishment and construction of said highway.

NOTICE IS FURTHER GIVEN, that on the 30th day of January, 1929, at the hour of 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the petitioner will present said petition and proof in support thereof to said Superior Court in the courthouse at Wenatchee, Washington, for hearing and determination and for the fixing of a time at which a jury shall be called to determine the amount of compensation to be made and the parties to whom the same shall be paid.

Dated this 5th day of January, 1929.

CHELAN COUNTY, WASHINGTON,
Petitioner.
By J. A. ADAMS,
Prosecuting Attorney.

Office and Post Office Address:
Commercial Bank Building,
Wenatchee, Chelan County, Washington.

Filed Jan. 5, 1929. L. T. Armstrong, Clerk. G. Simon, Deputy. [4]

[Title of Court and Cause—No. 8792.]

PETITION.

To the Honorable Superior Court of the State of Washington in and for Chelan County, and to the Judge Thereof:

The petitioner alleges:

I.

That at all times herein mentioned the petitioner, Chelan County, Washington, was and now is a duly constituted, organized and existing county and legal subdivision of the State of Washington.

II.

On the 30th day of October, the Board of County Commissioners of Chelan County, Washington, by unanimous vote, passed a resolution and caused the same to be entered upon the minutes of said Board, declaring that the laying out and establishment of a county road along the south shore of

Lake Chelan from a point in the interior of Lot 3, Section 3, Township 27 N., R. 21 E., W. M., at survey station 420 plus 96.5 of south Lake Shore Road as established and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9 an interior point in the SW.¼ NE.¼ of Section 4, Township 27 N., R. 21 E., W. M., being a point of intersection with the Twenty-five Mile Creek Road, to be a public necessity and declaring the intention of said Board to lay out and establish said road and directing the [5] County Engineer to report upon said project, all in accordance with Chapter 173, Session Laws of Washington, 1925.

III.

Thereupon the County Engineer made an examination of said proposed road and a survey thereof, and made a report to said Board in writing, as required by law, in which report the County Engineer found among other things, said proposed road to be practicable and the construction thereof to be a public necessity, and filed with said report a map of the proposed road, as required by law, together with his field-notes and profiles of such survey. And thereafter and on the 30th day of October, 1928, the Board of County Commissioners of Chelan County set the matter of the laying out and establishment of said road and the report of the County Engineer thereon, for hearing on November 23, 1928, at the office of the Board of County Commissioners in the courthouse at Wenat-

chee, Washington, and caused notice of said hearing to be posted and published in the form and for the length of time provided by law.

IV.

On the said 23d day of November, 1928, a public hearing on the laying out and establishment of said road and upon the report of the County Engineer thereon, was held by said Board of County Commissioners, and the said Board made and entered its order finding said road to be a public necessity and establishing the said road as a public highway, on the route designated and described in the report of the said County Engineer. It was and is further provided by said order of the Board of County Commissioners on November 23, 1928, that the Prosecuting Attorney of Chelan County be and he is thereby directed to proceed under the power of eminent domain to acquire such lands and other property or property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use, and commence [6] and prosecute to a conclusion condemnation suits for the acquisition of property and rights of way for said new highway as so laid out and established.

V.

Petitioner has been unable to agree with the respondent for the purchase of the right of way hereinafter described, and in order to construct the said highway upon the route laid out and established by the said Board of County Commissioners,

it is necessary for the petitioner to acquire a right of way for highway purposes more particularly described as follows, to wit:

A road right of way 60 feet in width over and across Lot 5, Section 4, T. 27 N. R. 21 E. W. M., particularly located and described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N. R. 21 E. W. M. and run thence N. 0 degrees 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85 degrees 07′ W., 351.3 feet; thence N. 54 degrees 40′ W., 762.7 feet; thence N. 35 degrees 11′ W., 240.6 feet more or less to the south boundary line of said Lot 5 of Section 4, T. 27 N., R. 21 E. W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line. From the initial point, as hereinabove described, continue thence N. 35 degrees 11′ W., 30 feet; thence on a 2 degree curve to the left having a central angle of 6 degrees 28′ a distance of 323.5 feet more or less to the west line of said Lot 5 of Section 4, T. 27 N. R. 21 E. W. M., the end of this description, which described parcel of land contains 0.49 acre more or less.

ALSO, a road right of way over and across the northeast corner of the SW.¼ of the SW.¼ of Section 3, T. 27 N. R. 21, E. W. M.,

being only that part of the right of way of the South Lake Shore Extension Road that overlaps the said SW.¼ of the SW.¼ of said Section 3, and being more *particlarly* located and described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N. R. 21 E. W. M., and run thence N. 0 degrees 44′ E., following the section line between said Sections 3 and 4 a distance of 1976.6 feet; thence S. 85 degrees 07′ E. 240.7 feet; thence S. 51 degrees 32′ E., 640.5 feet; thence S. 85 degrees 48′ E., 809.1 feet; thence S. 48 degrees 50′ E., 752.4 feet; thence on a 6 degree curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW.¼ of the SW.¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running south from the initial point as hereinabove described, following the east boundary line of said SW.¼ of the SW.¼ of Section 3, to a point 30 feet distant from the survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a [7] curve having a radius of 985 feet, being parallel and 30 feet distant from survey alignment curve at this place, to the north boundary line of said SW.¼ of the SW.¼ of Section 3; thence east following the north boundary line of said SW.¼ of the SW. ¼ of Section 3, to the initial point

and place of beginning, which described parcel of land contains 0.02 acre more or less.

VI.

That the object for which this proceeding is brought is to ascertain and determine the compensation to be made in money, to the owner or owners, respectively, and to all tenants, encumbrancers and *other* interested, for the taking or injuriously affecting the lands, real estate, premises and other property above described in the manner above set forth, and for a release from all liability for all damages to the adjoining lands of the respondent not taken, in any manner arising from the taking of the above-described property and the construction of a public highway thereon.

VII.

The object for which said lands, real estate, premises and other property are sought to be appropriated, acquired and injuriously affected by your petitioner is a public object and use, and that the public interest required the construction of the said highway upon the above-described right of way, and the said lands, real estate, premises and other property sought to be appropriated and injuriously affected are required and necessary for the laying out, establishment and construction of said highway.

VIII.

The following are the names of each and every owner, encumbrancer and person or party interested in the above-described property, or any part

thereof, so far as the same can be ascertained from the public records or otherwise, namely, Alice Barbee Wich, Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown). [8]

IX.

In order to acquire title to said property above described, it is necessary for your petitioner to condemn said property and to acquire the same for the public purposes aforesaid by appropriate proceedings under and by virtue of the power of eminent domain conferred upon your petitioner in common with other like *cororations* in and by the laws of the State of Washington, and your petitioner makes this petition for said purposes.

WHEREFORE, your petitioner prays that after due notice given according to law, it may be adjudged and decreed by this court that the contemplated use for which the above-described land, real estate, premises and other property are sought to be appropriated is really a public object and use, and that the public interest requires the laying out, establishment and construction of said highway, and that said land, real estate, premises and other property are required and necessary for the laying out, establishment and construction of said highway; that a jury be impaneled to ascertain and compensation to be made in money to the above-named owner of said land, for the taking and injuriously affecting the same, or in case a jury be waived, then that the compensation to be made as aforesaid be ascertained and determined by the

court or Judge thereof, and that the court apportion the damages so found among the persons entitled thereto; and that a judgment or decree be entered when said compensation shall have been determined to the effect that upon payment thereof by the petitioner full title to said property shall be at once vested in the petitioner for the uses set forth therein, and for such other relief as may be proper in the premises.

Dated this 5th day of January, 1929.

CHELAN COUNTY, WASHINGTON,
Petitioner.
By J. A. ADAMS,
Prosecuting Attorney. [9]

State of Washington,
County of Chelan,—ss.

John Godfrey, being first duly sworn, on oath deposes and says: That he is the duly elected, qualified and acting County Auditor of Chelan County, Washington, and *Ex-officio* Clerk of the Board of County Commissioners of said county, and as such officer makes this verification for and on behalf of the petitioner herein; that he has read the foregoing petition, knows the contents thereof and believes the same to be true.

JOHN GODFREY.

Subscribed and sworn to before me this 5th day of January, 1929.

[Superior Court Seal] L. T. ARMSTRONG,
Clerk of Superior Court. [10]

[Title of Court and Cause—No. 8792.]

AFFIDAVIT FOR PUBLICATION.

State of Washington,
County of Chelan,—ss.

S. M. Driver, being first duly sworn on oath deposes and says: That he is Deputy Prosecuting Attorney of Chelan County, Washington, a municipal corporation, petitioner in the above-entitled cause, and one of the attorneys for said petitioner; that he makes this affidavit for and on petitioner's behalf as a basis for the publication of notice to the respondents Alice Barbee Wick, and Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown).

That the said Alice Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, respondents above named, and each of them, is a person claiming an interest in the real property described in the petition and sought to be condemned by the petitioner herein; and that the said Alice Barbee Wick is a nonresident of the State of Washington. Affiant is informed and believes that said Alice Barbee Wick is a resident of the city of Philadelphia, in the State of Pennsylvania, and that her last-known address is and was "Care of Mr. Joseph B. Thomas, suite 27, Transportation Building, 26 South 15th Street, Philadelphia, Pennsylvania"; that on the 4th day of January, 1929, affiant deposited in the postoffice at Wenatchee, Washington, with postage fully prepaid addressed to said Alice Barbee Wick

at the address above given, a true and correct [11] copy of the notice and petition in the above-entitled cause.

That Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown), respondents above named, and each of them, is a nonresident of the State of Washington. Affiant is informed and believes that said Theodore S. Tettemer and Jane Doe Tettemer, his wife, and each of them, *it is* resident of the city of Philadelph*is* in the State of Pennsylvania, and that the last-known address of them and each of them is and was "Philadelphia, Pennsylvania." That on the 4th day of January, 1929, affiant deposited in the postoffice at Wenatchee, Washington, with postage fully prepaid, addressed to said Theodore S. Tettemer and Jane Doe Tettemer, his wife, at the address above given, and to each of them, a true and correct copy of the notice and petition in the above-entitled cause.

S. M. DRIVER.

Subscribed and sworn to before me this 5th day of January, 1929.

J. A. ADAMS,
Notary Public in and for the State of Washington,
Residing at Wenatchee.

Filed Jan. 5, 1929. L. T. Armstrong, Clerk. G. Simon, Deputy. [12]

[Title of Court and Cause—No. 8792.]

NOTICE OF PETITION AND BOND FOR REMOVAL.

To the Above-named Petitioner, and to J. A. Adams, Your Attorney:

You and each of you will please take notice that Alice Barbee Wick, Theodore S. Tettemer and Sallie E. Tettemer, his wife, the above-named respondents, appearing herein, specially for the purpose only of removing the above-entitled case to the District Court of the United States for the Eastern District of Washington, Northern Division, will, on Wednesday, the 30th day of January, 1929, at the hour of 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the above-entitled court, present petition and bond herein as required by law for the removal of said cause from the above-entitled court to the District Court of the United States for the Eastern District of Washington, Northern Division, said bond in the sum of $500.00 given on such removal and according to law and the requirements of the statute in such case made and provided, and copies of said petition and bond are herewith served upon you, and that after the filing of said petition and bond, to wit: at 9:30 o'clock in the forenoon on the 30th day of January, 1929, or as soon thereafter as counsel can be heard, the said respondents will present and call to the attention of said Superior Court of the State of Washington for Chelan County, at the Court House

of said Chelan County, at [13] Wenatchee, Washington, the said petition and bond and move said court to accept said petition and bond and approve said bond, and for an order of removal of said cause from the above-entitled court to said District Court of the United States for the Eastern District of Washington, Northern Division. Said motion for removal is to be made upon the grounds stated in said petition and bond, said petition and bond so filed and presented, and on all the records and files in the case.

J. D. CAMPBELL,

Attorney for Said Respondents, Appearing Specially as Aforesaid.

Copy of the foregoing notice and of the bond and petition in the above-entitled case for removal received this —— day of January, 1929.

_____,

Attorney for Petitioner.

Filed Jan. 25, 1929. L. T. Armstrong, Clerk. G. Simon, Deputy. [14]

[Title of Court and Cause—No. 8792.]

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

I.

Your petitioners, Alice Barbee Wick, Theodore S. Tettemer and Sallie E. Tettemer, his wife, respondents above named, appearing specially for the pur-

pose only of removing the above-entitled cause to the District Court of the United States for the Eastern District of Washington, Northern Division, respectfully shows to this Honorable Court that said petitioners and each of them are respondents in said suit, which is a civil suit in its nature, and that the matter now in dispute in this said cause exceeds the sum of value of $3,000.00 to said petitioners and each of them, exclusive of interest and costs.

II.

Your petitioners show to this Honorable Court that there is in said suit a separable controversy which is wholly between citizens of different states. That said petitioners and each of them were at the time of bringing said suit, ever since have been, and still are, citizens and residents of the State of Pennsylvania, and that said petitioners and each of them are not now and never have been residents of the State of Washington, and that said Chelan County, Washington, a municipal corporation, is a resident of and a Washington corporation. [15]

III.

That said controversy is of the following nature, viz.: A proceeding by petition for the purpose as alleged therein to establish a county road along the south shore of Lake Chelan from a point in the interior of lot 3, Section 3, Township 27, N. of Range 21, E. W. M., at survey station 420 plus 96.5 of south Lake Shore road as established and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9, an interior point, in

the SW.¼ of NE.¼ of Section 4, Township 27, North of Range 21, E. W. M., being a point of intersection of the Twenty-five Mile Creek Road, under the power of eminent domain and to acquire such lands and other property or property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use. Said petitioner in said proceeding is attempting to acquire a right of way for highway purposes more particularly described as follows:

> A road right-of-way 60 feet in width over and across lot 6, Section 4, Township 27 N., R. 21 E., W. M., particularly located and described as follows, to-wit:
>
> Tying to the section corner common to sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and runs thence North 0 degrees 44′ east, following the section line between said sections 3 and 4, a distance of 1976.6 feet; thence 85° 07′ west 351.3 feet; thence north 54° 40′ west 762.7 feet; thence north 35° 11′ west 240.6 feet more or less to the south boundary line of said lot 5 of section 4, Tp. 27 N., of R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line; From the initial point as hereinabove described, continue thence north 35° 11′ west 30 feet; thence on a 2 degree curve to the left having a central angle of 6° 28′ a distance of 323.5 feet more

or less to the west line of said lot 5 of Sec. 4, Tp. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 0.49 acres more or less.

Also a road right-of-way over and across the northeast corner of the SW.¼ of the SW.¼ of Sec. 3, Tp. 27 N., R. 21 E., W. M., being only that part of the right-of-way of the South Lake Shore Extension Road that overlaps the said SW.¼ of the SW.¼ of said Sec. 3, and being more particularly located and described as follows, to-wit:

Tying to the section corner common to sections 3, 4, 9 and 10, Tp. 27 N., R. 21 E., W. M., and run thence north 0 degrees 44′ east following the section line between said sections 3 and 4 a distance of 1976.6 feet; thence south 85° 07′ east 240.7 feet; thence south 51° 32′ east 640.5 feet; thence south 85° 48′ east 809.1 feet; thence south 48° 50′ east [16] 752.4 feet; thence on a 6 degree curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW.¼ of the SW.¼ of section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running south from the initial point as hereinabove described, following the east boundary line of said SW.¼ of the SW.¼ of section 3, to a point 30 feet distant from the survey line of said south Lake Shore Extension road; thence in a northwest-

erly direction on a curve having a radius of 985 feet, being parallel and 30 feet distant from survey alignment *s*urve at this place, to the north boundary line of said SW.¼ of the SW.¼ of section 3; thence east following the north boundary line of said SW.¼ of the SW.¼ of section 3 to the initial point and place of beginning, which described parcel of land contains 0.02 acre more or less;

The further object being to ascertain and determine the compensation to be made in money to the owner or owners respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting the lands, real estate, premises and other property above described in the manner above set forth and for a release from all liability for all damages to the adjoining lands of respondents not taken, in any manner arising from the taking of the above-described property for construction of a public highway.

IV.

It is further claimed in said petition that the object for which said lands, real estate, premises and other property are *south* to be appropriated, acquired and injuriously affected by petitioner is a public object and use, and that the public interest required the construction of the said highway upon the above-described right-of-way, and the said lands, real estate, premises and other property sought to be appropriated and injuriously affected are acquired and necessary for the laying out, establishment and construction of said highway.

V.

That the respondents herein are the persons and the only persons alleged to be interested in the above-described property, or any part thereof.

VI.

It is further alleged in said petition that in order to acquire title to said property above described it is necessary for said petitioner [17] to condemn said property and to acquire same for the public purposes aforesaid by appropriate proceedings under and by virtue of the power of eminent domain conferred upon said petitioner by the laws of the State of Washington.

VII.

That your petitioners desire to remove said cause to the United States District Court, Eastern District of Washington, Northern Division, and your petitioners make and file herein a bond in the sum of $500.00 with good and sufficient surety for said respondents and each of them entering said District Court of the United States for the Eastern District of Washington, Northern Division, wherein thirty days from the date of the filing of this petition a certified copy of the record of said cause, and for paying all costs that may be awarded by said District Court if it shall hold the said suit was wrongfully or improperly removed thereto.

WHEREFORE your petitioners pray that this Honoroble Court proceed no further herein except to accept this petition and said bond as required by law, and to order said case to be removed to the

District Court of the United States, Eastern District of Washington, Northern Division, and to order a transcript of the record made and filed in the District Court as provided by law, and to stay all further proceedings herein.

_____,

J. D. CAMPBELL,

Attorneys for Petitioners Herein Appearing Specially as Aforesaid.

Office and Postoffice Address:

1210 Old National Bank Building,

Spokane, Washington. [18]

State of Washington,

County of Spokane,—ss.

J. D. Campbell, being first duly sworn, on oath states *states* that he is one of the attorneys for petitioners, Alice Barbee Wick, Theodore S. Tettemer and Sallie E. Tettemer, his wife, respondents in the above-entitled case, and makes this verification on behalf of said petitioners and respondents. That he has read the foregoing petition, knows the contents thereof, and the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

J. D. CAMPBELL.

Subscribed and sworn to before me this 22 day of January, 1929.

[Seal] JOSEPH ROSSLOW,

Notary Public in and for the State of Washington, Residing at Spokane.

Filed Jan. 25, 1929. L. T. Armstrong, Clerk. G. Simon, Deputy. [19]

[Title of Court and Cause—No. 8792.]

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Alice Barbee Wick, Theodore S. Tettemer and Sallie E. Tettemer, husband and wife, respondents above, as principals, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized to do business in the State of Washington, as surety, are held and firmly bound unto Chelan County, the petitioner in the above-entitled cause, its successors and assigns, in the penal sum of Five Hundred Dollars ($500), lawful money of the United States of America, for the payment of which sum, well and truly to be made, the said principals hereby bind themselves, their heirs, administrators, executors, and the said surety company hereby binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22d day of January, A. D. 1929.

UPON CONDITION, NEVERTHELESS, that whereas the said respondents Alice Barbee Wick, Theodore S. Tettemer and Sallie E. Tettemer, husband and wife, simultaneously with the filing of this bond intend to file their petition in the above-

entitled suit or proceeding in the above-entitled court, for the removal of such suit or proceeding into the District Court of the United States [20] in the district where such suit or proceeding is pending, to wit: the District Court of the United States in and for the Eastern District of Washington, Northern Division, according to the provisions of the Act of Congress in such case made and provided,—

Now, if the said Alice Barbeee Wick, Theodore S. Tettemer and Sallie E. Tettemer, husband and wife, shall within thirty (30) days from the date of filing of said petition for removal, enter into the said District Court of the United States in and for the Eastern District of Washington, Northern Division, a certified copy of the record in said suit or proceeding, and shall well and truly pay or cause to be paid all costs that may be awarded by said District Court of the United States in and for the Eastern District of Washington, Northern Division, if said Court shall hold that *shall hold that* said suit or proceeding was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

ALICE BARBEE WICK. (Seal)
THEODORE S. TETTEMER. (Seal)
SALLIE E. TETTEMER. (Seal)
UNITED STATES FIDELITY AND GUARANTY CO.
[Seal] By WILLIS E. MAHONEY,
Attorney-in-fact.

The foregoing bond is hereby approved; accepted this 30 day of January, 1929.

W. O. PARR,
Judge of the Above-entitled Court.

Filed and recorded in Civil Bonds, Journal 3, pages 359–60. Jan. 25, 1929. L. T. Armstrong, Clerk. G. Simon, Deputy. [21]

[Title of Court and Cause—No. 8792.]

AFFIDAVIT OF SERVICE OF NOTICE OF PETITION AND BOND ON REMOVAL.

State of Washington,
County of Chelan,—ss.

G. H. Strevel, being first duly sworn, upon oath deposes and says that at all times herein mentioned he was and now is a citizen of the United States of America and resident of the State of Washington, over the age of twenty-one years, not a party to the above-entitled action, and competent to be a witness therein, that on the 24 day of January, 1929, he served the annexed notice of petition and bond for removal upon the defendant Alice Barbee Wick, by delivering to J. A. Adams, as *at*orney by delivering in the hands of and leaving with the said J. A. Adams on the date aforesaid at his office in Wenatchee, Chelan County, Washington, a full, true and correct copy of the annexed notice of petition and bond for removal.

Signed—G. H. STREVEL.

Subscribed and sworn to before me this 25 day of January, 1929.

[Seal] L. T. ARMSTRONG,
County Clerk.
By C. W. Armstrong,
Dep.

Fee ..... .60
Service .....
Mileage ..... .20

.80

Filed Jan. 25, 1929. L. T. Armstrong, Clerk. G. Simon, Deputy. [22]

[Title of Court and Cause—No. 8792.]

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of Chelan,—ss.

I, Carrie I. Skinner, being first duly sworn, on oath, depose and say: That I am the principle clerk of the World Publishing Co., a corporation organized and existing under the laws of the State of Washington, the owner and publisher of "The Wenatchee Daily World," a legal daily newspaper printed and published at the office of the owner and publisher thereof in the City of Wenatchee, County of Chelan, and State of Washington, since prior to the year 1910; that I make this affidavit for and on behalf of said corporation; that said newspaper is a newspaper of general circulation in *sia*d county

and state, and has at all times been and now is printed and published in the English language, and that the notice in the Matter of Chelan County vs. Alice Barbee Wick, Theodore S. Tettemer *and* et al., No. ——, a printed copy of which is hereunto attached, was published in said newspaper proper and not in supplement form, in the regular and entire edition of said paper once each week for a period of 4 consecutive weeks beginning on the 7 day of January, 1929, and ending on the 28 day of January, 1929, both dates inclusive, and that said newspaper was regularly distributed to its subscribers during all of said period.

That the full amount of the fee charged for the foregoing publication is the sum of $17.25, which amount has been paid [23] in full.

CARRIE I. SKINNER.

Subscribed and sworn to before me this 30th day of January, 1929.

J. A. ADAMS,
Notary Public in and for the State of Washington,
Residing at Wenatchee, Chelan County.

(Newspaper Clipping Attached.)

J. A. ADAMS, COMMERCIAL BANK BLDG.

No. ——

NOTICE.

In the Superior Court of the State of Washington, in and for the County of Chelan.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

ALICE BARBEE WICK, THEODORA S. TETTEMER and JANE DOE TETTEMER, His Wife (True Christian Name Unknown),

Respondents.

The State of Washington, to Theodore S. Tettemer and Jane Doe Tettemer, His Wife (True Christian Name Unknown), and Alice Barbee Wick, Respondents:

YOU ARE HEREBY NOTIFIED that the petitioner, Chelan County, Washington, a municipal corporation, has filed in this above-entitled court, with the clerk thereof, a petition showing that the Board of County Commissioners of Chelan County has entered an order declaring the construction of a public highway along the south shore of Lake Chelan from a point in the interior of Lot 3, Section 3, Township 27 NR 21, EWM at survey station 420 plus 96.5 of South Lake Shore Road, as established

and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9, an interior [24] point in the SW¼,NE¼ of Section 4, Township 27 N, R. 21, EWM, being a point of intersection with the Twenty-five Mile Creek Road, to be a public necessity and has laid out and established the said highway in accordance with provisions of Chapter 173, Session Laws of Washington, 1925; and has ordered the Prosecuting Attorney of Chelan County to proceed under the power of eminent domain to acquire such lands and other property and property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use; and in order to construct the said highway upon the route, laid out and established by the said Board of County Commissioners it is necessary for the petitioner to acquire a right of way for highway purposes over and across lands and promises owned by respondent and more particularly described as follows, to-wit:

A road right of way 60 feet in width over and across Lot 5, Section 4, T 27 N R 21 EWM, particularly located and described as follows, to-wit:

Tying to the section corner common to Section 3, 4, 9 and 10 T 27 N. R. 21, EWM, and run thence N. 0 deg. 44 min. E. following the section line between said sections 3 and 4 a distance of 1976.6 feet; thence N. 85 deg. 07 min. W, 351.3 feet; thence N. 54 deg. 40 min. W. 762.7 feet, thence N. 35 deg. 11 min. W. 240.6 feet, more or less, to the south boundary line of said Lot 5 of Section 4 T.

27 N. R. 21 E. W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the follow*inn* described line. From the initial point, as hereinabove described, continue thence No. 35 Deg. 11 min. W 30 feet; thence on a 2 deg. curve to the left having a central angle of 6 deg. 28 min. a distance of 323.5 feet, more or less, to the west line of said Lot 5 of Section 4, T. 27 N. R. 21, E. W. M., the end of this description which described parcel of land contains [25] 0.49 acres more or less.

Also, a road right of way over and across the northeast corner of the SW¼ of the SW¼ of Section 3, T. 27 N. R. 21, E. W. M. being only that part of the right of way of the South Lake Shore Extension Road that overlaps the said SW¼ of the SW¼ of said Section 3, and being more particularly described and located as follows, to-wit:

Tying to the section corner common to Section 3, 4, 9 and 10, T 27 N R 21, E.W.M. and run thence N. 0 deg. 44 min. E. following the section line between said sections 3 and 4 a distance of 1976.6 feet; thence S. 85 deg. 07 min. E. 240.7 feet; thence S. 51 deg. 32 min. E. 640.5 feet; thence S. 85 deg. 48 min. E. 809.1 feet; thence S. 48 deg. 50 min. E. 752.4 feet; thence on a 6 deg. curve to the left, having a radius of 955 feet, a distance of 66 feet, more or less, to the northeast corner of said SW¼ of the SW¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running

south from the initial point as hereinabove described, following the east boundary line of said SW¼ of the SW¼ of Section 3, to a point 30 feet distant from the survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a curve having a radius of 985 feet; being parallel and 30 feet distant from survey alignment curve at this place, to the north boundary line of said SW¼ of the SW¼ of Section 3, thence east following the north boundary line of said SW¼ of the SW¼ of Section 3, to the initial point and place of beginning, which described parcel of land contains 0.02 acre, more or less.

The object of said proceeding is to ascertain and determine the compensation to be made in money to the owner or owners respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting the lands, real estate and premises above described, in the manner set forth in said [26] petition and for a release from all liability for all damages to the adjoining lands of the respondent not taken, in any manner arising from the taking of the above described property and the construction of a public highway thereon, and to obtain a decree that the contemplated use for which said lands, real estate, premises and other property are sought to be appropriated is a public object and use and that the public interest requires the laying out, establishment and construction of said highway, and that said lands, real estate, premises and other property sought to be appropriated and injuriously affected are required and necessary

for the laying out, establishment and construction of said highway.

Notice is further given, That on the 30th day of January, 1929, at the hour of 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the petitioner will present said petition and proof in support thereof to said Superior Court in the courthouse at Wenatchee, Washington, for hearing and determination and for the fixing of a time at which a jury shall be called to determine the amount of compensation to be made, and the parties to whom the same shall be paid.

Dated this 5th day of January, 1929.

CHELAN COUNTY, WASHINGTON,
Petitioner.
By J. A. ADAMS,
Prosecuting Attorney.

Office and Post Office Address:
Commercial Bank Building,
Wenatchee, Chelan County, Wash.

Filed Jan. 30, 1929. L. T. Armstrong, Clerk. G. Simon, Deputy. [27]

(Receipts Attached.)

RETURN RECEIPT.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

MARGARET ROSBOROUGH,
(Signature or name of addressee.)

_____,
(Signature of addressee's agent.)

Date of Delivery—Jan. 14, 1929.
Post Office Department.
Official Business.
Registered Article No. S–728.
Insured Parcel No. ——.
RETURN TO—J. A. Adams, Pros. Attorney of Chelan Co.
Street and Number or Post Office Box—34 Commercial Bank Bldg.
Post Office at—Wenatchee,
State—Washington.
Post Office Department.
Official Business.
Registered Article No. S–736.
Insured Parcel No. ——.
Return to—J. A. Adams, Pros. Attorney of Chelan Co.

(Name of Sender.)

Street and Number, or Post Office Box—34 Commercial Bank Bldg.
Post Office at—Wenatchee,
State—Washington.

RETURN RECEIPT. 83424

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

JOSEPH B. THOMAS,
(Signature or name of addressee.)
For Miss ALICE BARBEE WICK,
(Signature of addressʼs agent.)
Date of delivery, Jan. 14th, 1929. [28]

[Title of Court and Cause—No. 8792.]

ORDER OF REMOVAL.

The petition of Alice Barbee Wick, Theodore S. Tettemer and Sallie E. Tettemer, his wife, respondents in the above-entitled cause, having regularly come on for hearing and determination before the court on this 30th day of January, 1929, and said respondents appearing specially for the purpose only of removing said cause to the District Court of the United States, Eastern District of Washington, Northern Division; and it appearing to the court that said respondents have made and filed herein, petition for removal in the form, at the time, and in the manner, and in all respects as provided by law, and that they have filed herein a bond in the penal sum of $500.00 in due form and duly executed with good and sufficient surety, duly conditioned for said respondents entering in said District Court, within thirty days from the filing of said petition, a certified copy of the record of the Superior Court, and for paying all costs that may be awarded by said District Court if it shall hold that said suit was improperly or wrongfully removed thereto, and that written notice of said petition and bond was given to said petitioner prior to the filing of said petition and bond, in the form, at the time and in the manner provided by law, and that it is proper for said cause to be removed *to be removed* to said United States District Court,— [29]

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said petition and bond be and they are hereby accepted; that the above-entitled case be and it is hereby removed to said District Court of the United States, Eastern District of Washington, Northern Division; and that the Clerk of this court be, and he is hereby directed to prepare and certify forthwith a transcript of the record in said cause for filing in the said District Court within the time allowed by law; and that all other proceedings in this court be stayed.

Done in open court this 30 day of January, 1929.

W. O. PARR,
Judge.

Filed and Recorded in Civil Journal, Vol. 14, pages 365–6, Jan. 30, 1929. Compared by G & C. L. T. Armstrong, Clerk. G. Simon, Deputy. [30]

In the Superior Court of the State of Washington.

APPEARANCE DOCKET—VOL. 28.

Page 317.
No. 8792.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Plaintiff,

vs.

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, His Wife (True Christian Name Unknown),

Defendants.

Plaintiff's Attorney—J. A. ADAMS.
Defendants' Attorney—J. D. CAMPBELL.

NATURE OF ACTION—Condemnation.

Date of Filing. Mo.	Day.	Year.	Papers Filed.	Fees.
Jan.	5	1929	Notice of Petition.	
Jan.	5	1929	Affidavit of Publication.	
Jan.	25	1929	Notice and Petition for Bond for Removal	2.00
Jan.	25	1929	Petition for Removal, etc.	
Jan.	25	1929	Bond on Removal.	
Jan.	25	1929	Affidavit of Service.	
Jan.	30	1929	Affidavit of Publication.	
Jan.	30	1929	Order of Removal. [31]	

[Title of Court and Cause—No. 8792.]

CERTIFICATE OF CLERK OF SUPERIOR COURT TO TRANSCRIPT OF RECORD ON REMOVAL.

State of Washington,
County of Chelan,—ss.

I, L. T. Armstrong, Clerk of the Chelan County Superior Court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above-entitled cause as I have been directed by the appellants to transmit to the District Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Superior Court this 19 day of February, 1929.

[Seal] L. T. ARMSTRONG,
Clerk.
By Gladys Simon,
Deputy Clerk. [32]

AFFIDAVIT OF SERVICE.

State of Washington,
County of Spokane,—ss.

J. D. Campbell, attorney for defendant, being first duly sworn, deposes and says: I served the attached notice and special appearance and motion to quash upon plaintiff, Chelan County, Washington, a municipal corporation by depositing true and correct copies thereof in the postoffice at Spokane, Washington, properly wrapped for transmission through the mail, with postage prepaid thereon, addressed to Attorney J. A. Adams, Wenatchee, Washington. That there is regular mail communication between Spokane, Washington, and Wenatchee, Washington.

J. D. CAMPBELL.

Subscribed and sworn to before me this 15th day of March, 1929.

[Seal] JOSEPH ROSSLOW,
Notary Public, Residing at Spokane, Washington.
[33]

In the District Court of the United States, Eastern District of Washington, Northern Division.

On Removal from Chelan County, Washington.

L.–4502.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, Whose True Name is SALLIE E. TETTEMER, His Wife,

Respondents.

NOTICE OF APPEARANCE.

To Chelan County, Washington, a Municipal Corporation, and to J. A. Adams, Your Attorney:

You will please take notice that defendants are appearing specially in the above-entitled cause and if the purpose for which said special appearance is made shall not be sanctioned or sustained by the court or by the Appellate Court if an appeal is taken within due time, said defendants will appear generally in the cause within the time allowed therefor by the law, or by the order of court, or by stipulation of parties.

This notice is given you in accordance with Rule 22 of the Rules of Practice of the Federal Court of the Ninth Judicial District.

J. D. CAMPBELL,
Attorney for Respondents,
Appearing Specially.

P. O. Address:
1210 Old National Bank Bldg.,
Spokane, Washington. [34]

[Title of Court and Cause—No. L.–4502.]

SPECIAL APPEARANCE AND MOTION TO QUASH.

Come now the above-named respondents, Alice Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, whose true name is Sallie E. Tettemer, his wife, appearing herein specially for the purpose of this motion only, and object to the jurisdiction of this court over the persons of these respondents and each of them, and move the court to vacate and quash and set aside the pretended service of a notice of filing and of hearing of the petition of the above-named petitioner as pretended to be served upon these respondents and each of them, for the following reasons and upon the following grounds, viz:

1. That the said pretended notice was and is irregularly and illegally issued.

2. That the said pretended notice is not such as is prescribed by law.

3. That said pretended notice has not been served or returned as provided by law.

4. That the statutes of the State of Washington on which the above-entitled proceeding was instituted, do not [35] provide for sufficient or adequate service of notice in such cases upon nonresident owners of property affected.

5. That said statutes do not either provide for personal service of such notice upon nonresidents of the State of Washington, nor the mailing of a copy of such notice to nonresidents as a prerequisite to the right of publication.

6. That the aforesaid pretended notice in the above-entitled action does not comply either in form or substance with the statute of the State of Washington governing these proceedings and does not constitute due notice.

7. That the effect of the service of the notice provided by said statutes of the State of Washington in this proceeding against interested parties or property owners not residing within the State of Washington, and especially upon those residing in a distant state, is to permit the property or property rights of such nonresident owners to be confiscated and taken without due process of law.

8. That the act or statute of the State of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and service thereof by publication upon nonresident owners or interested parties, is contrary to the Constitution of the State of Washington which provides "that

no person shall be deprived of life, liberty or property without due process of law," and is therefore unconstitutional and void.

9. That the effect of the service of the notice provided by said statutes of the State of Washington in this proceeding against interested parties or property owners not residing within the State of Washington, and especially those residing in a distant state of the United States, is to deny to them, as in this case, citizens of such other state, the privileges and immunities of citizens of the State of Washington, and permits [36] the property or property rights of such nonresident owners to be confiscated and taken contrary to Art. IV, Sec. 2, of the Constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and is therefore unconstitutional and void.

10. That the statute of the State of Washington upon which the above-entitled proceeding is based, and more particularly that part of said act or statute providing for the notice and service thereof by publication upon nonresident owners or interested parties (who in this case are residents and citizens of the State of Pennsylvania), is contrary to the Constitution of the United States—Amendment 14, Sec. 1—which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection

of the laws, and is therefore unconstitutional and void.

11. This motion is based upon all the records and files in the above pretended action.

J. D. CAMPBELL,
Attorney for Respondents, Appearing Specially.
P. O. Address:
1210 Old National Bank Bldg.,
Spokane, Washington.

Service accepted and copy received this —— day of ————, 1929.

————————————,
Attorney for Petitioner.

Filed Mar. 19, 1929. [37]

[Title of Court and Cause.—No. L.–4502.]

ORDER DENYING MOTION TO QUASH.

The respondents' motion to quash having come on for hearing and determination before the court this 15th day of April, 1929, and respondents appearing specially in support of said motion, and Chelan County, Washington, a municipal corporation, petitioner, having appeared by its attorneys, J. A. Adams and Sam Driver, and the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the motion to quash made and entered herein be, and the same is hereby denied, to which ruling respondents except, and exception is allowed.

IT IS FURTHER ORDERED that respondents be and they are hereby given and granted fourteen days in which to appear further in said cause.

Done in open court this 15th day of April, 1929.

J. STANLEY WEBSTER,
Judge.

Filed Apr. 15, 1929. [38]

[Title of Court and Cause.—No. L.–4502.]

DEMURRER PRESERVING SPECIAL APPEARANCE.

Come now respondents and still reserving and retaining their special appearance and their right to question the jurisdiction of the court and the constitutionality of the statute or statutes by which they have been brought into court, and demur to the pretended petition on the following grounds and each of them:

1. That the court has no jurisdiction of the person of the defendants or of either of them.

2. That the court has no jurisdiction of the subject matter of the action.

3. That the complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them.

4. That said pretended position does not state facts sufficient to entitle petitioner to the relief asked.

5. That the statutes of the State of Washington relating to condemnation proceedings by corpora-

tions of the character of petitioner under which this proceeding was instituted are unconstitutional and void especially as to nonresidents, being in violation of Article III, Section 2, Article IV, Section 2, Amendment Article V, and Amendment Article XIV, Sec. 1, of the [39] Constitution of the United States and each of them, and are also in violation of other provisions of the Constitution of the United States.

VI.

That the eminent domain statutes of the State of Washington being Secs. 921, 922, 924, 925, 926, 927, 929, 930, 931, 932, 935, 936, of Remington's Code, are in violation of Article I, Secs. 2, 3, 16, and 32, and are in violation of Article II, Sec. 19, of the Constitution of the State of Washington, and each of them, and are also in violation of other provisions of the Constitution of the State of Washington.

VII.

That these proceedings are unconstitutional and void as to these respondents.

J. D. CAMPBELL,

Attorney for Respondents, Alice Barbee Wick, Theodore S. Tettemer and Sallie E. Tettemer, His Wife, Appearing Specially.

Filed Apr. 29, 1929. [40]

Filed Apr. 29, 1929.

[Title of Court and Cause.—No. L.–4502.]

MOTION TO MAKE MORE DEFINITE AND CERTAIN, OR IN THE ALTERNATIVE FOR BILL OF PARTICULARS.

Come now respondents and still preserving and retaining their special appearance and their right to question the jurisdiction of the court and the constitutionality of the statute or statutes by which they have been brought into court, and move the court to require petitioner to make its petition more definite and certain or in the alternative to require petitioner to furnish bill of particulars by setting forth

I.

As to paragraph 2 in said petition, by stating whether or not the purported resolution referred to in paragraph 2 of said petition appears as a part of the minutes of the proceedings of the County Commissioners of Chelan County, Washington, and if so, to state the book or volume and page where recorded in said Commissioners' minutes, and by stating whether or not, if so recorded, it is recorded in the same volume with the other minutes of said Commissioners for said month of October, 1928.

II.

By making said paragraph 2 more definite and certain by setting out copy of said purported resolution referred to in paragraph 2. [41]

III.

To make paragraph 3 of said petition more defi-

nite and certain by setting out in full the report of the County Engineer, together with map of proposed road, together with field notes and profiles of such survey, all as alleged in said paragraph 3 of said petition.

IV.

To make paragraph 3 of said petition more definite and certain by setting out the order or other record by which the said County Commissioner set the matter of the alleged laying out and establishing of said road for hearing on November 23, 1928, at the office of the Board of County Commissioners in the Court House at Wenatchee, Washington, together with a copy of said alleged notice and a copy of the proof of posting thereof, all as alleged in paragraph 3.

V.

To make paragraph 4 more definite and certain by setting out copy of said alleged order finding said road to be a public necessity and establishing said road and directing the prosecuting attorney of Chelan County, Washington, to proceed under the power of eminent domain to acquire said lands and other property rights, all as alleged in said paragraph 4.

VI.

To make paragraph 5 of said petition more definite and certain by setting out what portion of said property is owned by respondent, Alice Barbee Wick, and how many acres it consists of, and by setting out what portion belongs to respondents Theodore S. Tettemer and wife, and how many acres their said property consists of.

VII.

To make said petition more definite and certain by setting out in full the proceedings before the County Commissioners of Chelan County, [42] Washington, including copies of all records, minutes, resolutions, notices, proof of posting or service thereof leading up to the alleged laying out and establishment of said alleged road, and the authority conferred upon the Prosecuting Attorney of Chelan County, Washington, to bring said proceedings in eminent domain.

VIII.

To make said petition more definite and certain by setting out whether petitioner seeks to acquire full title to said real estate whereon said road is to be established, or whether petitioner seeks simply an easement for the purpose of constructing a highway over the same.

And in the event that the foregoing motions to make more definite and certain or for bill of particulars are denied as to setting out or furnishing copies called for, then respondents move the court to require petitioner to submit copies of all records of the proceedings of the County Commissioners of Chelan County including copies of minutes, records, resolutions, notices, proof of posting or service thereof, pertaining to the establishment of said road and the bringing of this proceeding.

J. D. CAMPBELL,

Attorney for Respondents, Appearing Specially.

[43]

State of Washington,
County of Spokane,—ss.

J. D. Campbell, being first duly sworn, deposes and says: I am the attorney for respondents in the above-entitled action. I have read the foregoing motion for bill of particulars, and the same is not made for the purpose of delay, but the information called for therein is necessary to respondents in order that they may safely plead to petitioner's petition. That the respondents and each of them are without the State of Washington, and for that reason this verification is made by affiant.

J. D. CAMPBELL.

Subscribed and sworn to before me this 29th day of April, 1929.

[Seal] JOSEPH ROSSLOW,
Notary Public, Residing at Spokane, Washington.

[44]

[Title of Court and Cause—No. L.–4502.]

ORDER DENYING MOTION TO MAKE MORE DEFINITE AND CERTAIN AND FOR BILL OF PARTICULARS, AND ORDER OVERRULING DEMURRER.

Respondents' motion to make more definite and certain or in the alternative for bill of particulars and respondents' demurrer to petition having come on for determination before the court this 21st day of October, 1929, petitioner having appeared by its

attorneys, J. A. Adams and Sam Driver, and respondents having appeared specially by their attorney J. D. Campbell, and the court being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED that said motion to make more definite and certain or in the alternative for bill of particulars be, and the same is hereby denied.

IT IS FURTHER ORDERED that respondents' demurrer to petition herein be and the same is hereby overruled, to which rulings respondents except, and exception allowed.

Done in open court this 21st day of October, 1929.

J. STANLEY WEBSTER,
District Judge.

Filed Oct. 21, 1929. [45]

[Title of Court and Cause—No. L.-4502.]

MOTION FOR SETTING CASE FOR TRIAL.

Comes now petitioner above named and respectfully moves the Court that the above-entitled cause be set down for trial.

This motion is based upon the records and files herein, and the subjoined affidavit.

J. A. ADAMS,
Prosecuting Attorney for Chelan County, Washington, Attorney for Petitioner.

State of Washington,
County of Chelan,—ss.

Sam M. Driver, being first duly sworn on oath,

deposes and says: That he is the duly appointed, qualified and acting deputy Prosecuting Attorney for Chelan County, Washington, and as such is one of the attorneys for the petitioner in the above-styled cause.

That said action was instituted in the Superior Court of the State of Washington in and for Chelan County, by filing of petition and notice on the 5th day of January, 1929, for the purpose of acquiring by condemnation the real property of the respondents particularly described in said petition, for public highway purposes. That thereafter and on January 30, 1929, the said Superior Court made and entered its order removing said cause to the United States District Court, Eastern District of [46] Washington, Northern Division. That respondents thereupon appeared specially by their attorney J. D. Campbell of Spokane, Washington, and moved to quash service of notice in the above-styled action, which motion was denied by order of the above-entitled court made and entered on April 15, 1929. That respondents thereafter moved to require petitioner to make its petition more definite and certain and interposed a demurrer to said petition, which motion and demurrer were duly overruled by the above-entitled court by order made and entered on October 21, 1929.

That no further proceedings whatsoever have been had or taken in the above-styled cause, and that thereafter and prior to February 10, 1930, the exact date being to this affiant unknown, J. D. Campbell, attorney of record for the respondents

in the above-entitled action, died, and that since his death no other attorney has appeared of record in the action for the respondents or either of them. That the attorneys for the petitioner first learned of the death of said J. D. Campbell on February 10, 1930, and thereafter, on February 13, 1930, affiant notified the respondents and each of them, by letter directed to the following address: "Care of Joseph B. Thomas, Suite 27 Transportation Building, 26 South 15th Street, Philadelphia, Pennsylvania," of the death of said J. D. Campbell. That respondents and each of them are residents of Philadelphia in the State of Pennsylvania according to affiant's information and belief, and that when the Board of County Commissioners for Chelan County, Washington, was considering the establishment of the highway involved in this action, one Adrian W. Vollmer, attorney at law, residing at Lakeside, Chelan County, Washington, wrote to the said Board of County Commissioners and to the Prosecuting Attorney for Chelan County, Washington, purporting to represent [47] the respondents as their attorney, and advised said Prosecuting Attorney by letter as follows: "Please note that the mail address of Miss Alice Barbee Wick and of Miss Margaret Rosborough is now care of Mr. Joseph B. Thomas, Suite 27, Transportation Building, 26 South 15th Street, Philadelphia, Pennsylvania." In this letter, which is dated July 6, 1928, the said Adrian W. Vollmer also requested that copies of notices and communications be sent to the parties at the above address.

That affiant sent a copy of said letter, in which he advised respondents of the death of J. D. Campbell, and requested them to employ another attorney to represent them in the case, to said Adrian W. Vollmer, directed to Lakeside Post Office, Chelan County, Washington; that each of said letters was mailed in an envelope upon which appeared the return address of the Prosecuting Attorney for Chelan County, Washington, and no copy of said letter was ever returned to him.

SAM M. DRIVER.

Subscribed and sworn to before me this 30th day of April, 1930.

[Seal] J. A. ADAMS,

Notary Public in and for the State of Washington, Residing at Wenatchee. [48]

AFFIDAVIT OF MAILING MOTION FOR SETTING CASE FOR TRIAL.

State of Washington,
County of Chelan,—ss.

I, Faye Hamilton, being first duly sworn on oath, depose and state:

That I am and was at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of twenty-one years, competent to be a witness in the within entitled action, and not a party to it.

That I served the attached motion upon Miss Alice Barbee Wick and Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown), and upon Mr. Adrian W. Vollmer,

by mailing by registered mail a true and correct copy of the said attached motion to the said Miss Alice Barbee Wick and Theodore S. Tettemer and wife, and Mr. Adrian W. Vollmer, the said copies being deposited in envelopes addressed: "Miss Alice Barbee Wick and Mr. Theodore S. Tettemer and Mrs. Theodore S. Tettemer, Care of Mr. Joseph B. Thomas, Suite 27, Transportation Building, 26 South 15th Street, Philadelphia, Pa. Register RRR"; and "Mr. Ardian W. Vollmer, Attorney, Lakeside Post Office (Chelan County) Washington, Please Forward if Necessary. Register RRR"; and with the postage thereon fully prepaid, same being deposited in the postoffice at Wenatchee, Washington, on the 2d day of May, 1930.

FAYE HAMILTON.

Subscribed and sworn to before me this 7th day of May, 1930.

[Seal] L. J. GEMMILL,

Notary Public in and for the State of Washington, Residing at Wenatchee.

Filed May 8, 1930. [49]

PROOFS OF MAILING NOTICES OF HEARING AND TRIAL.

Post Office Department.
Official Business.
Registered Article.
No. S–2014.
Insured Parcel.
No. 52130.
60773.
Penalty for Private Use to Avoid Payment of Postage $300.

Postmark of Delivering Office
And Date of Delivery.
Address Your Mail to
Street and Number
Philadelphia Pa 8
May 13
6–PM
1930

Return to J. A. ADAMS, Prosecuting Attorney.
(Name of Sender.)
Street and Number)
or Post Office Box.) 31 Commercial Bank Bldg.
Post Office at—Wenatchee,
State—Washington.
Rev. 3–24.
c5–6116.

RETURN RECEIPT.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

MISS ALICE BARBEE WICK.
(Signature or name of addressee.)
By JOSEPH B. THOMAS, Atty.
(Signature of addressee's agent.)

Date of delivery—May 13, 1930.

Form 3811. Government Printing Office. C5–6116.

Filed May 26, 1930.
L.–4502. [50]

[Title of Court and Cause—No. L.–4502.]

NOTICE OF HEARING FOR ORDER OF NECESSITY.

To Alice Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, His Wife (True Christian Name Unknown) Defendants, (c/o Joseph B. Thomas, Suite 27 Transportation Bldg., 26 S. 15th St., Philadelphia, Pa.), and to Adrian W. Vollmer, Esq., Attorney for Said Parties (Lakeside, Wn.).

TAKE NOTICE that the above-entitled case has been set for hearing in said court at Spokane, Wn., on June 5, 1930, at 10 A. M., for order of necessity.

(Signed) EVA M. HARDIN,
Clerk.

(Notices mailed by ordinary mail on May 26, 1930.)

E. L. C. [51]

[Title of Court and Cause—No. L.–4502.]

NOTICE RE FIXING DATE OF TRIAL.

To J. A. Adams, Prosecuting Attorney for Chelan County, Washington; to Alice Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, His Wife (True Christian Name Unknown), (c/o Joseph B. Thomas, Suite 27, Transportation Bldg., 26 S. 15th St., Philadelphia, Pa.), and to Adrian W. Vollmer, Esq., Attorney for Said Parties (Lakeside, Wash.).

TAKE NOTICE that the above-entitled case has been set for trial in said court, at Federal Bldg., Spokane, on Thursday, Nov. 20, 1930, at 10 A. M.

EVA M. HARDIN,
Clerk U. S. District Court.

(Notices mailed as above indicated by ordinary mail 10–28–30.)

E. L. C. [52]

[Title of Court and Cause—No. L.–4502.]

AFFIDAVIT OF ADRIEN WINSTON VOLLMER.

State of Pennsylvania,
City and County of Philadelphia,—ss.

Adrien Winston Vollmer, being first duly sworn on oath, deposes and says: That he is not and has never been and never pretended to be counsel for any or all of said parties in said cause, nor has he ever appeared in said cause. That he does not reside in the State of Washington and has not even visited or been in said State for over twenty-three months.

ADRIEN WINSTON VOLLMER.

Sworn and subscribed to before me this 7 day of November, 1930.

LINDEN T. HARRIS,
Notary Public.

Commission expires April 1, 1931.

[Seal] LINDEN T. HARRIS,
Notary Public in and for the State of Pennsylvania, Residing at Philada. [53]

[Title of Court and Cause—No. L.–4502.]

AFFIDAVIT OF MAILING.

State of Washington,
County of Spokane,—ss.

I, Alma Pendell, being first duly sworn on oath, do depose and say:

That I am and was at all time herein mentioned a citizen of the United States, and a resident of the State of Washington, over the age of twenty-one years, competent to be a witness in the within entitled action, and not a party to it.

That I served the attached affidavit of Adrien Winston Vollmer upon J. A. Adams, Prosecuting Attorney for Chelan County, by registered mail; a true and correct copy of the said attached affidavit being deposited in envelope addressed to Mr. J. A. Adams, Prosecuting Attorney for Chelan County, Wenatchee, Washington, and with the postage thereon fully prepaid, same being deposited in the postoffice at Spokane, Washington, on the seventeenth day of November, 1930. Attached hereto is the receipt, numbered 12882, issued by the postoffice to me for the said registered mail.

ALMA PENDELL.

Subscribed and sworn to before me this 17th day of November, 1930.

[Seal] FLORENCE E. WHITE,

Notary Public in and for the State of Washington, Residing at Spokane. [54]

Receipt for Registered Article No. 12882.

Registered at the Post Office indicated in Postmark.

Fee paid 15 cents Class postage ——.

Return Receipt fee 3 Spl. Del'y fee ——.

Delivery restricted to addressee: In person —— or order ——.

Accepting employee will place his initials in space indicating restricted delivery.

POSTMASTER, per A. (MAILING OFFICE)
(Postmark of)
Spokane, Wash.
Reg. Div.
Nov.
17,
1930.

The sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

REGISTRY FEES AND INDEMNITY.—Domestic registry fees range from 15 cents for indemnity not exceeding $50 up to $1.00 for indemnity not exceeding $1,000. The fee on domestic registered matter without intrinsic value and for which indemnity is not paid is 15 cents. Consult postmaster as to the specific domestic registry fees and as to the registry fees chargeable on registered parcel-post packages for foreign countries. Fees on domestic registered C. O. D. mail range from 25 cents to $1.20. Indemnity claims must be filed within one year (C. O. D. six months) from date of mailing.

Form 3806 (Rev. 7–1–29).
C5–6852.
U. S. Government Printing Office: 1929.

Filed Nov. 18, 1930. [55]

TRANSCRIPT OF COMMISSIONERS' PROCEEDINGS.

PLAINTIFF'S EXHIBIT No. 1.

L.–4501. L.–4502. Plaintiff's Exhibit No. 1. Adm. E. M. H.

RESOLUTION.

The Board of County Commissioners of Chelan County, Washington, at a regular meeting of the board held on the 30th day of October, 1928, by unanimous vote of such board adopted the following Resolution:

"BE IT RESOLVED, that the Board of County Commissioners of Chelan County, Washington, hereby declare their intention to lay out and establish a county road along the southerly shore of Lake Chelan in said county, to be known as the Change in South Lake Shore Estension Road, beginning at an interior point in Lot 3 of Section 3, Township 27 N. R. 21, E. W. M. at survey station 420+96.5 of South Lake Shore Road as now established and of record, and running thence in a general northwesterly direction by a most feasible route and ending at survey station 488+00.9 (an intersection with Twenty-five Mile Creek Road) being an interior point in the SW.¼ NE.¼ Section 4, Township 27 N. R. 21, E. W. M., the whole distance being about 1.3 miles; and said Board do hereby declare that said road is considered a public necessity.

And the county engineer of said county is hereby directed to make an examination of such proposed road and if necessary a survey thereof and report upon such project in writing to the Board.

THE BOARD OF COUNTY COMMISSIONERS OF CHELAN COUNTY, WASHINGTON.

J. H. MILLER.
J. A. MILSON.
W. J. TAYLOR.

Attest: A. V. SHEPHARD,
Clerk. [56]

State of Washington,
County of Chelan,—ss.

In the Matter of the Resolution of Board of County Commissioners et al. for a County Road to be known as the South Lake Shore Extension Road.

FIELD NOTES.

Said road commences at survey station 420+96.5 of South Lake Shore Road being an interior point in Government Lot 3 of Section 3, T. 27 N., and run thence as follows, from a course bearing N. 63° 52′ W.

Sta.	Course	Distance feet.	Feet Curves.	Remarks.
	N. 63° 52′ W.			
420+96.5	P. C.			
			D 20° L	
421+88.0	P. I.		△ 35° 26′	
			T 91.5	
422+73.7	P. T.		L 177.2	
	S. 80°42′W.	3.5		
422.+77.2	P. C.			
			D 21° R	
423+59.8	P. I.		△ 33° 41′	
			T 82.6	
424+37.6	P. T.		L 160.4	
	N. 65°37′W.	215.1		
426+52.7	P. C.			
			△ 7° 19′	
427+13.7	P. I.		D 6° R	

Sta.	Course	Distance feet.	Feet Curves.	Remarks.
			T 61.0	
427+74.6	P. T.		L 121.9	
	N. 58°18′W.	656.2		
434+30.8	P. C.			
			D 4° L	
439+17.8	P.I.		△ 37°33′	
			T 487.0	
443+69.6	P. T.		L 938.8	
	S. 84°09′W.	326.6		
446+96.2	P. C. [57]			
			D 6° R	
448+52.0	P. I.		△ 47° 01′	
			T 155.8	
449+90.1	P. T.		L 293.9	
	N 48° 50′ W.	290.3		
452+80.4	P. C.			

Sta.	Course	Distance feet.	Feet Curves.	Remarks.
			D 8° L	D
455+19.8	P. I.		△ 36° 58′	I
457+42.5	P. T.		T 239.4	A
			L 462.1	G
	N 85° 48′ W.	61.5		R
458+04.0	P. C.			A
			D 12° R	M
459+51.2	P. I.		△ 34° 16′	S
			T 147.2	
460+89.5	P. T.		L 285.5	O
	N 51° 32′ W.	75.1		M
461+64.6	P. C.			I
			D 12° L	T
463+08.7	P. I.		△ 33° 35′	T
			T 144.1	E
464+44.5	P. T.		L 279.9	D.

Sta.	Course	Distance feet.	Feet Curves.	Remarks.
	N 85° 07′ W.	156.1		
466+00.6	P. C.			
			D 10° R	
467+56.6	P. I.		△ 30° 27′	
			T 156.0	
469+05.1	P. T.		L 304.5	
	N 54° 40′ W.	442.7		
473+47.8	P. C.			
			D 6° R	
475+11.8	P. I.		△ 19° 29′	
			T 164.0	
476+72.5	P. T.		L 324.7	
	N 35° 11′ W.	106.6		
477+79.1	P. C.			
			D 2° L	
479+83.2	P. I.		△ 8° 09′	

Sta.	Course	Distance feet.	feet Curves.	Remarks
			T 204.1	
481+86.6	P. T.		L 407.5	
	N 43° 20′ W.	231.9		
484+18.5	P. C.			
			D 6° R	
485+44.6	P. I.		△ 15° 03′	
			T 126.1	
486+69.3	P. T.		L 250.8	
	N 28° 17′ W.	131.6		
488+00.9				Point in present traveled road end of new location. [58]

I hereby certify that the field notes and maps herewith submitted are correctly prepared, and that the survey was made on April 27, and 28, May 12, 21, 22, June 22 and July 3, 1928.

Dated this 30th day of October, 1928.

JOHN DUFF,
County Engineer. [59]

State of Washington,
County of ....., —ss.

In the Matter of the Petition of ..... et al. for a County Road to be known as the ..... Road.

FIELD NOTES.

Said road commences at .....

LEVEL NOTES as FOLLOWS:

Sta.	+Rod.	H. I.	-Rod.	Elev.	Remarks.
	6.32	1177.45			1171.13 on G. N. "P." Line Hub.
420+96.5			13.2	1164.3	
P. C.					
421+00			13.1	64.4	
+50			9.8	67.6	
422+00			7.2	70.2	
+50			4.3	73.1	
+73			10.71	66.74	
423+00			14.8	62.6	
T. P.	2.67	1170.00	10.12	1167.33	

Sta.	+Rod.	H. I.	-Rod.	Elev.	Remarks.
+50			14.7	55.3	
424+00			7.4	62.6	
+50			5.4	64.6	
425+00			4.5	65.5	
+50			2.6	67.4	

[60]

Sta.	+Rod.	H. I.	-Rod.	Elev.	Remarks.
425+70		1170.00	.09	69.1	
T. P.	4.75	1173.53	1.22	1168.78	
426+00			5.7	67.8	
+50			8.1	65.4	
427+00			7.5	66.0	
+50			6.2	67.3	
428+00			5.2	68.3	
+50			4.8	68.7	
429+00			3.2	70.3	
B. M.			6.04	1167.49	1167.49 on 36″ pine tree 5 ft. right Sta. 428+65.
T. P.	2.26	1175.35	0.44	1173.09	
+50			2.2	73.1	
430+00			2.7	72.6	
+50			3.6	71.7	
431+00			5.8	69.5	
+50			5.7	69.6	

Sta.	+Rod.	H. I.	-Rod.	Elev.	Remarks.
432+00			4.5	70.8	
+50			5.0	70.3	
433+00			7.4	68.0	
+23			12.7	62.6	
+50			10.5	64.8	
434+00			5.3	70.0	
+50			3.3	72.0	
T. P.	1.37	1174.24	2.48	1172.87	
435+00			3.6	70.6	
+50			6.0	68.2	
436+00			9.2	65.0	
+50			11.3	62.9	
T. P.	6.91	1170.72	10.43	1163.81	
+92.5			10.72	1160.00	on hub
437+00			11.4	59.3	

[61]

Station.	+Rod.	H. 1.	−Rod.	Elev.	REMARKS.
437+50		1170.72	14.8	1155.9	
438+00			11.6	59.1	
+50			8.1	62.6	
439+00			4.0	66.7	
+50			2.8	67.9	
B. M.			8.73	1161.99	1161.99 spike in 18″ pine tree 40 Ft. right of Sta. 439+75.
440+00			4.4	66.3	
+20			5.8	64.9	
+50			11.2	59.5	
+70			4.6	66.1	
441+00			1.2	69.5	
T. P.	1.13	1170.97	0.88	1169.84	
+50			3.1	67.9	
442+00			5.5	65.5	
+50			8.9	62.1	fence line.
443+00			9.5	61.5	

Station.	+Rod.	H. I.	–Rod.	Elev.	REMARKS.
+50			7.7	63.3	
444+00			4.1	66.9	
B. M.			8.44	1162.53	on 24″ pine tree 25 Ft. Rt. Sta. 444+40= G. N. B. M. Elev. 1162.59.
T. P.	4.10	1172.08	2.99	1167.98	
+50			2.4	69.7	
445+00			2.7	69.4	
+50			4.4	67.7	
446+00			6.7	65.4	
+50			7.8	64.3	
447+00			8.5	63.6	
+50			7.6	64.5	
448+00			6.8	65.3	
T. P.	5.44	1171.70	5.82	1166.26	
+50			6.2	65.5	

[62]

Station.	+Rod.	H. I.	−Rod.	Elev.	REMARKS.
449+00			6.4	65.3	
+50			5.2	66.5	
450+00			6.0	65.7	
[63]					
450+50		1171.70	6.7	1165.0	
451+00			6.8	64.9	
+50			6.3	65.4	
T. P.	4.29	1170.62	5.37	1166.33	
452+00			4.1	66.5	
+50			4.8	65.8	
453+00			5.5	65.1	
+50			6.7	63.9	
454+00			7.8	62.8	
+50			8.3	62.3	
T. P.	6.54	1167.60	9.56	1161.06	

Station	+Rod.	H. I.	—Rod.	Elev.	REMARKS.
455+00			4.6	63.0	
+50			3.5	64.1	
456+00			4.0	63.6	
+50			4.2	63.4	
457+00			4.2	63.4	
T. P.	2.97	1168.33	2.24	1165.36	
+50			3.1	65.2	

I hereby certify that the field notes and maps herewith submitted are correctly prepared, and that the survey was made on .....

Dated this 30 day of October, 1928.

JOHN DUFF,
County Engineer. [64]

State of Washington,
County of .....,—ss.
In the Matter of the Petition of ..... et al. for a County Road to be Known as the ..... Road.

FIELD NOTES.

Said road commences at .....

Sta.	+Rod.	Distance, Feet H. I.	Distance Feet —Rod.	Elev.	Leavel Notes Continued: REMARKS.
458+00		1168.33	4.56	1163.7	
+50			5.6	62.7	
459+00			6.6	61.7	
B. M.			0.15	1168.18	On School Marm Stump 25′ Lt. Sta. 459 10= G. N. B. M. Elev. 1168.24.
+50			7.2	61.1	
460+00			6.6	61.7	
+50			7.2	61.1	
461+00			7.0	61.3	
+50			6.2	62.1	On hub 461+60.7.
T. P.	5.65	1168.15	5.83	1162.50	
642+00			5.6	62.6	
+50			5.0	63.2	
463+00			4.9	63.3	
+50			4.7	63.4	

[65]

Station.	+Rod.	H. I.	-Rod.	Elev.	REMARKS.
464+00		1168.15	6.0	62.2	
+50			6.9	61.3	
465+00			6.5	61.7	
+50			6.0	62.2	
T. P.	5.76	1168.56	5.35	1162.80	
466+00			5.8	62.8	
+50			5.1	63.5	
467+00			5.7	62.9	
+50			6.4	62.2	
468+00			6.1	62.5	
+50			6.5	62.1	
469+00			6.3	62.3	
+50			5.2	63.4	
470+00			4.8	63.8	
+50			3.8	64.8	
471+00			2.7	65.9	
+50			1.8	66.8	

Station.	+Rod.	H. I.	–Rod.	Elev.	REMARKS.
T. P.	11.24	1178.80	1.00	1167.56	
+55			14.0	64.8	
+72			14.4	64.4	
+80			10.2	68.6	
472+00			9.6	69.2	
+50			9.0	69.8	
473+00			9.8	69.0	
+50			11.4	67.4	
474+00			9.7	69.1	
+50			7.8	71.0	
475+00			7.0	71.8	
[66]					
+50			5.8	73.0	
476+00			4.9	73.9	
+50			4.2	74.6	
+72.5			5.2	73.6	
[67]					

Sta.	+Rod.	H. I.	-Rod.	Elev.	REMARKS
447+00		1178.80	3.9	74.9	
T. P.	6.80	1182.83	2.77	1176.03	
+50			8.7	74.1	
478+00			5.4	77.4	
B. M.			5.87	1176.96	Spike in 12″ pine tree 5 Ft. Rt. Sta. 477 +80= G. N. B. M. Elev. 1176.96
T. P.	5.32	1187.95	0.20	1182.63	
+44			5.3	82.7	
+58			6.4	81.6	
+60			3.0	85.0	
479+00			2.3	85.7	
+50			7.8	80.2	
T. P.	10.59	1187.10	11.44	1176.51	
480+00			10.1	77.0	
+50			7.6	79.5	
481+00			3.8	83.3	
+50			2.2	84.9	Irrigation Ditch

Sta.	+Rod.	H. I.	-Rod.	Elev.	REMARKS.
T. P.	12.85	1199.89	0.06	1187.04	
482+00			14.6	85.3	
+50			11.4	88.5	
483+00			6.8	93.1	Irrigation Ditch
+50			3.5	96.4	
B. M.			3.24	1196.65	On 12″ poplar tree 40 Ft. Lt. Sta. 483+10
+58.1			3.37	96.5	Hub.
T. P.	7.18	1195.78	11.29	1188.60	
+90			13.0	82.8	
484+00			14.0	81.8	
+27			15.7	80.1)	
				)	Creek
+40			14.8	81.0)	
+42			12.9	82.9	
+50			11.2	84.6	
+92			9.2	86.6	

[68]

Sta.	+Rod.	H. I.	–Rod.	Elev.	REMARKS.
485+00			6.3	89.5	
+50			1.9	93.9	
[69]					
		1195.78			
T. P.	9.58	1204.82	0.54	1195.24	
486+00			6.8	98.0	
+50			7.6	97.2	
487+00			4.3	1200.4	
+35			1.8	1202.9	
T. P.	9.02	1213.20	0.64	1204.18	
+50			6.7	1206.5	
+70			3.6	1209.6	
488+00.9			3.9	1209.3	End of Proposed Improvement
B. M.			4.58	1208.62	On 20″ pine tree 50 Ft. Lt. Sta. 487 50=G. N. B. M. Elev. 1208.67

I hereby certify that the field notes and maps herewith submitted are correctly prepared, and that the survey was made on April 27 & 28, May 12–21 & 22 June 22 and July 3rd, 1928.

Dated this 30th day of October 1928.

JOHN DUFF,
County Engineer. [70]

State of Washington,
County of Chelan,—ss.

In the Matter of the Resolution of the Board of County Commissioners for a County Road to be Known as the South Lake Shore Extension Road.

ENGINEER'S REPORT.

To the Honorable Board of County Commissioners of Said County:

Gentlemen:

I, John Duff, County Engineer of said County, having, on the 30th day of October, 1928, been duly ordered by your Honorable Board to make an examination and if necessary, a survey of the above proposed road and report thereon, did, on the 30th day of October, 1928, and the —— days of 19——, in obedience to said order and the statures in such cases made and provided, proceed to and did make said examination and survey and herewith submit the following as my report thereon:

FIRST.

In my opinion said road is a necessity and should be established and opened, for the reason that there

is no other road which is of equal utility for the citizens residing in the vicinity of said proposed road.

SECOND.

The terminal points, general course and length of said proposed road, as examined and surveyed, are as follows:

Commencing at survey station 420+96.5 of South Lake Shore Road, as of record, the same being an interior point in Govt. Lot 3, of Sec. 3, Twp. 27 N. Rg. 21 E.W.M. runs thence in a general northwest [71] direction, across Govt. Lots 3, 2 and 1 and the SW¼ of SW¼ of Sec. 3, Twp. 27 N. Rg. 21 E.W.M. and Govt. Lots 6 & 5 of Sec. 4, Twp. 27 N. Rg. 21 E.W.M. and the SW¼ of NE¼ of Sec. 4 Twp. 27 N. Rg. 21 E.W.M. and ends at survey sta. 488+00.9 being an interior point in the SW¼ of NE¼ of Sec. 4, Twp. 27 N. Rg. 21 E.W.M. the total length being 1 mile 146 rods and 15.4 feet.

THIRD.

I recommend that said road be established sixty (60) feet in width, except as hereinafter stated, to-wit.

FOURTH.

The names of persons interested in lands over which said proposed road will pass, who consent to the establishment of the same, and waive all claims for damages caused thereby, are shown below:

FIFTH.

The names of all persons interested in lands over which said proposed road will pass, who refuse their consent to the establishment of same, together with

the amount of damages claimed by each, are shown below:

SIXTH.

An estimate of damages to each tract of land of nonconsenting persons interested in such tract of land over which said proposed road will pass, is shown below:

SEVENTH.

A description of each tract of land over which said proposed road will pass, with the name and place of residence or address of the owners, lessees, claimants or incumbrancers thereof, if known and the quantity of land to be taken from each of said tracts, is shown below: [72]

Names and Address or Residence of Owner Lessee or Incumbrancer (State if Unknown)	Description of Land Subdivision	Sec.	Twp.	Rge.	Quantity to be taken Acres	100's	Estimated Damages $ cts.	Estimated Benefits $ cts.	Damages Claimed $ cts.	Remarks State if Damages Claimed Waived or Don't Consent
Margaret Rosborough, Philadelphia, Penn.	Lot 3	3	27	21	1	78				
"	" 2	3	27	21	1	87				
"	" 1	3	27	21	2	02				
"	" 6	4	27	21	1	85				
Alice Barbee Wick Philadelphia, Penn.	SW. ¼ of SW. ¼	3	27	21		02				
"	Lot 5	4	27	21		49				
Kathryn Watson	SW. ¼ of NE. ¼	4	27	21	Right of way secured.					

EIGHTH.

The probable cost of construction of said road will be as follows:

Items	Amount
Bridges and Culverts	600.00
Clearing and Grubbing	400.00
Grading	14,500.00
Damages	
Cost Bill of Survey (estimated)	150.00
Total estimated cost of said road	15,650.00

NINTH.

Such other facts, matters and things as I deem important to be known by your Honorable Board, are as follows:

The character of right of way is as follows: [73] 1500 ft. of steep side hill with some small timber, 2170 ft. of raw land with grease wood & scrub pine, slope not so steep, 305 ft. of light slope, scattered scrub pine & grease wood, 225 ft. raw land cleared, 750 ft. cleared & cultivated, 500 ft. part orchard rest uncultivated, 100 ft. cleared raw land, 350 ft. second growth pine, balance to end of road same as last with xing for creek, land rocky.

I also file with this report the written consent and waivers of claims to damages, together with claims for damages, by persons interested in the lands affected by the establishment of said proposed road; a map of said proposed road as the same is laid out and surveyed, with the name of the

owner of each tract of land written thereon, and a transcript of the field notes of the survey thereof.

Respectfully submitted this 30th day of October, 1928.

JOHN DUFF,
County Engineer.

By ————————————,
Deputy. [74]

NOTICE OF HEARING ON CHANGE IN SOUTH LAKE SHORE EXTENSION ROAD.

NOTICE IS HEREBY GIVEN, That a hearing will be held before the Board of County Commissioners of Chelan County, Washington on November 23rd, 1928, at the hour of 10:30 A. M.

Said hearing will be held at the Commissioners Office in the Court House in Wenatchee, Washington to determine whether a proposed County road shall be established, being a change in the South Lake Shore Road along the Southerly side of Lake Chelan, the width of said road shall be 60 feet and the termini and route thereof as recommended in the County Engineer's report is as follows:

Commencing at survey sta. 420+96.5 of So. Lake Shore Road, as of record being an interior point in Lot 3 of Sec. 3 Twp. 27 N. Rg. 21 *E.* E. W. M., running thence, from a course N. 63° 52′ W. on a 20° curve to left thru an angle of 35° 26′ 177.2 ft. thence S. 80° 42′ W., 3.5 ft. thence on a 21° curve to right thru an angle of 33° 41′, 160.4 ft.; thence N.

65° 37′ W., 215.1 ft.; thence on 6° curve to right, thru an angle of 7° 19′, 121.9 ft.; thence N. 58° 18′ W. 656.2 ft.; thence on 4° curve to left thru an angle of 37° 33′, 938.8 ft.; thence S. 84° 09′ W., 326.6 ft.; thence on a 16° 00′ curve to the right thru an angle of 47° 01′, 293.9 ft. thence N. 48° 50′ W., 290.3 ft., thence on an 8° 00′ curve to left thru angle of 36° 58′, 462.1 ft., thence N. 85° 48′ W., 61.5 ft. thence on a 12° 00′ curve to right thru an angle of 34° 16′, 285.5 ft.; thence N. 51° 32′ W., 75.1 ft.; thence on a 12° 00′ curve to left, thru an angle of 33° 35′, 279.9 ft.; thence N. 85° 07′ W., 156.1 ft.; thence on a 10° 00′ curve to right thru an angle of 30° 27′, 304.5 ft.; thence N. 54° 40′ W., 442.7 ft.; thence on a 6° 00′ curve to right thru an angle of 19° 29′—324.7 ft.; thence N. 35° 11′ W., 106.6 ft.; thence on a 2° 00′ curve to left thru an angle of 8° 09′,—407.5 ft.; thence N. 43° 20′ W., 231.9 ft.; thence on a 6° 00′ curve to right thru an angle of 15° 03′, 250.8 ft.; thence N. 28° 17′ W. 131.6 ft. and ending at survey sta. 488+00.9 (an intersection with Twenty-five Mile Creek Road) being an [75] interior point in S.W. ¼ of N.E. ¼ of Sec. 4 Twp. 27 N. Rg. 21 E. W. M. the whole distance being about 1.3 miles, said road to be known as the So. Lake Shore Extension Road, all in Chelan County, Washington.

At said hearing any interested persons may appear and be heard for or against the establishment of the proposed change, in the South Lake Shore Road.

Dated at Wenatchee, Washington, this 31st day of October, 1928.

A. V. SHEPARD,
Clerk of th
Clerk of the Board. [76]

State of Washington,
County of Chelan,—ss.

In the Matter of the Resolution of County Commissioners et al. for a County Road to be known as So. Lake Shore Extension Road.

AFFIDAVIT OF POSTING NOTICES.

John H. Larner, being first duly sworn on oath, deposes and *say* that on the 1st day of November, 1928, he posted due and legal notices of the hearing upon the report of the Engineer in the matter of the County Road above mentioned, as follows:

One notice on 4″ pine tree 10 ft. to right of sta. 422+25.

One notice on 5″ pine tree 5 ft. to left of Sta. 449+10.

One notice on 4″ pine tree 5 ft. to left of Sta. 487+55.

JOHN H. LARNER.

Subscribed and sworn to before me this 2d day of November, 1928.

[Seal] JOHN GODFREY.

[Chelan County
Auditor's
Seal
State of Washington] [77]

In the Superior Court of the State of Washington, in and for the County of Chelan.

In the Matter of the Change in South Lake Shore Extension Road, Chelan County.

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of Chelan,—ss.

D. R. Stohl, being first duly sworn, on oath, depose and say: That I am the principal clerk of the World Publishing Company, a corporation organized and existing under the laws of the State of Washington, the owner and publisher of "The Wenatchee Daily-World" a legal daily newspaper printed and published at the office of the owner and publisher thereof in the city of Wenatchee, County of Chelan, and State of Washington, since prior to the year 1910. That I make this affidavit for and on behalf of said corporation; that said newspaper is a newspaper of general circulation in said county and state, and has at all times been and now is printed and published in the English language, and that the Notice of Hearing in the Matter of the Change in South Lake Shore Extension Road, Chelan County, No. ——, a printed copy of which is hereunto attached, was published in said newspaper proper and not in supplement form in the regular and entire edition of said paper once each week for a period of 4 consecutive weeks, beginning on the 1 day of November, 1928, and ending on the 22 day of November, 1928, both dates in-

clusive, and that said newspaper was regularly distributed to its subscribers during all of said period.

That the full amount of the fee charged for the foregoing publication is the sum of $7.75 which amount has been paid in full.

D. R. STOHL. [78]

Subscribed and sworn to before me this 22 day of November, 1928.

A. V. SHEPHARD,

Deputy Auditor in and for the State of Washington, Residing at Wenatchee, Chelan County.

[Chelan County
Auditor's
Seal
State of Washington] [79]

NOTICE OF HEARING ON CHANGE IN SOUTH LAKE SHORE EXTENSION ROAD.

NOTICE IS HEREBY GIVEN, That a hearing will be held before the Board of County Commissioners of Chelan County, Washington, on November 23rd, 1928, at the hour of 10:30 A. M.

Said hearing will be held at the Commissioner's Office in the Court House in Wenatchee, Washington to determine whether a proposed County road shall be established, being a change in the South Lake Shore Road along the Southerly side of Lake Chelan, the width of said road shall be 60 feet and the termini and route thereof as recommended in the County Engineer's report is as follows:

Commencing at survey station 420 plus 96.5 of So. Lake Shore Road, as of record being an interior point in Lot 3 of Sec. 3, Twp. 27 N. Rg. 21, E. W. M.; running thence from a course N. 63 deg. 52 min. W. on a 20 deg. curve to left through an angle of 35 deg. 26 min. 177.2 ft.; thence S. 80 deg. 42 min. W. 3.5 feet; thence on a 21 deg. curve to right through an angle of 33 deg. 41 min. 160.4 feet; thence N. 65 deg. 37 min. W. 215.1 feet; thence on a 6 deg. curve to right, through an angle of 7 deg. 19 min. 121.9 feet; thence N. 58 deg. 18 min. W. 656.2 feet; thence on a 4 deg. curve to left through an angle of 37 deg. 33 min. 938.8 feet; thence S. 84 deg. 09 min. W. 326.6 feet; thence on a 16 deg. 00 min. curve to the right through an angle of 47 deg. 01 min. 293.9 feet; thence N. 48 deg. 50 min. W. 290.3 feet; thence on an 8 deg. 00 min. curve to left through angle of 36 deg. 58 min. 462.1 feet; thence N. 85 deg. 48 min. W. 61.5 feet; thence on a 12 deg. 00 min. curve to right through an angle of 34 deg. 16 min. 285.5 feet; thence N. 51 deg. 32 min. W. 75.1 feet; thence on a 12 deg. 00 min. curve to left, through an angle of 33 deg. 35 min. 279.9 feet; thence N. 85 deg. 07 min. W. 156.1 feet; thence on a 10 deg. 00 min. curve to right through an angle of 30 deg. 27 min. 304.5 feet; thence N. 54 deg. 40 min. W. 442.7 feet; thence on a 6 deg. 00 min. curve to right through an angle of 19 deg. 29 min. 324.7 feet; thence N. [80] 35 deg. 11 min. W. 106.6 feet; thence on a 2 deg. 00 min. curve to left through an angle of 8 deg. 09 min. 407.5 feet; thence N. 43 deg. 20 min. W. 231.9

feet; thence on a 6 deg. 00 min. curve to right through an angle of 15 deg. 03 min. 250.8 feet; thence N. 28 deg. 17 min. W. 131.6 feet, and ending at survey station 488 plus 00.9 (an intersection with Twenty-five Mile Creek Road), being an interior point in S.W. ¼ of N.E. ¼ of Sec. 4, Twp. 27 N. Rg. 21, E. W. M., the whole distance being about 1.3 miles, said road to be known as the So. Lake Shore Extension Road, all in Chelan County, Washington.

At said hearing any interested persons may appear and be heard for or against the establishment of the proposed change, in the South Lake Shore Road.

Dated at Wenatchee, Washington, this 31st day of October, 1928.

A. V. SHEPHARD,
Clerk of the Board. [81]

In the Matter of the Establishment of the Change in South Lake Shore Extension Road, Chelan County.

ORDER OF ESTABLISHMENT.

In the Matter of the Establishment of the Change in South Lake Shore Extension Road, Chelan County, the Board finds as follows:

First. That the Resolution therefor was passed on the 30th day of October, 1928, whereby the Board of County Commissioners declared their intention to lay out and establish said road, and the County

Engineer was duly directed to examine and if necessary survey the route of said proposed road.

Second. That on the 30th day of October, 1928, the County Engineer filed in the office of the Board his report in writing and at the same time a map and field notes of the proposed road, as provided by law, and the 23d day of November, 1928, was set as the day for hearing on said report, and legal notice of such hearing was duly given.

Third. That said report of the County Engineer shows:

(1) That in his opinion said proposed road is a necessity and ought to be established and opened.

(2) The terminal points, general course and length of road.

(3) His recommendation that said road be established not less than sixty nor more than one hundred feet in width.

(4) A list of persons interested in lands over which said road passes who consented to the establishment of the road and waived all claims to damages.

(5–6) A list of names of persons interested in lands through which the road passes who have not consented to the establishment of the road; and an estimate of the benefits and damages to non-consenting owners of land by reason of the establishment of said road as follows:

Description of Land Part of Section	Sec.	Tp.	Rg.	Area Acres	100ths	Name of Owner
Lot 3	3	27	21	1	78	Margaret Rosborough
Lot 2	3	27	21	7	87	Margaret Rosborough
[82]						
Lot 1	3	27	21	2	02	Margaret Rosborough
Lot 6	4	27	21	1	85	Margaret Rosborough
SW¼ SW¼	3	27	21		02	Alice Barbee Wick
Lot 5	4	27	21		49	Alice Barbee Wick

(7) A description of each tract of land over which said road passes, with the name and place of residence or address of the owners, lessees, claimants or incumbrancers and the quantity or area of land taken from each tract.

(8) That the probable cost of the construction of the road, including all necessary bridges, culverts, and all clearing, grubbing and grading, will be $15,650.00.

(9) That due notice of the time and place of the hearing of the establishment of said road on November 23, 1928, was given in the manner required by law, and the Board having examined the report of the Engineer, the map, and all other papers on file in the proceedings, and heard and considered all testimony and documentary evidence adduced for and against the establishment of the road, and having heretofore by an order duly passed awarded damages in the sum of $1.00 to each of the non-consenting owners of land through which the right-of-way passes; and all other persons interested in lands to be taken having previously consented to the establishment of said road and having waived their claims to damages therefor, and the Board being satisfied that the said road would be of public utility.

IT IS ORDERED BY THE BOARD, all the members concurring, that the Change South Lake Shore Extension road be established as follows:

Commencing at survey station 420+96.5 of South Lake Shore Road as of record, the same being an interior point in Gov't Lot 3, of Sec. 3, Twp. 27 N., Rg. 21, E. W. M., runs thence in a general northwest direction across Gov't Lots 3, 2 and 1 and the SW.¼ of SW.¼ of Sec. 3, Twp. 27 N., [83] Rg. 21, E. W. M., and Gov't Lots 6 and 5 of Sec. 4, Twp. 27 N., Rg. 21, E. W. M., and the SW.¼ of NE.¼ of Sec. 4, Twp. 27 N., Rg. 21, E. W. M., and ends at survey sta. 488+00.9 being an interior point in the SW.¼ of NE.¼ of Sec. 4, Twp. 27 N., Rg. 21, E. W. M., the total length being 1 mile 146 rods and 15.4 feet, and as shown upon the map of the County Engineer, and that from henceforth said road shall be a County Road of sixty feet in width, and that the same be opened according to law.

Done this 23d day of November, 1928.

J. A. WILSON,
W. J. TAYLOR,
Board of Commissioners of Chelan County, Wash.

Attest: A. V. SHEPHARD,
Clerk of Board. [84]

State of Washington,
County of Chelan,—ss.

I, the undersigned Clerk of the Board of County Commissioners of Chelan County, State of Washington, do hereby certify that the foregoing is a true and correct copy of ALL proceedings before the Board of County Commissioners of Chelan

County, Washington, in the matter of the establishment of South Shore Extension Road as of record in this office.

WITNESS my hand and official seal, this 4th day of June, 1930.

A. V. SHEPHARD,

Deputy Auditor and Clerk of the Board of County Commissioners.

[Chelan County
Auditor's
Seal

State of Washington] [85]

Filed Jun. 23, 1930.

[Title of Court and Cause—No. L.–4502.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF PUBLIC USE AND NECESSITY.

The above-entitled cause came on regularly for trial before the Honorable J. Stanley Webster, Judge of the above-entitled court, upon the application of the petitioner for an order adjudicating public use and necessity; the Court having heretofore considered respondents' special appearance and motion to quash, special appearance and motion to make more definite and certain, special appearance and demurrer, and each of them, and having announced that the same and each of them would be overruled and denied; petitioner appearing at the hearing on the question of public use and necessity

by Sam M. Driver, Deputy Prosecuting Attorney of Chelan County, Washington, respondents failing to appear in person or by attorney, and the Court having duly heard and considered the evidence and being fully advised in the premises, makes the following

FINDINGS OF FACT.

I.

That each and all of the respondents in the above-entitled cause were duly served in the *ammner* prescribed by law with the notice and petition herein, and that this Court has jurisdiction of respondents, and of each and all of them, and of the subject matter of these proceedings. That the respondents are all the owners, encumbrancers and persons or parties interested in the property described in the notice and petition herein. [86]

II.

That at all times herein mentioned the petitioner, Chelan County, Washington, was and now is a duly constituted, organized and existing county and legal subdivision of the State of Washington.

III.

On the 30th day of October, 1928, the Board of County Commissioners of Chelan County, Washington, by unanimous vote, passed a resolution and caused the same to be entered upon the minutes of said Board, declaring that the laying out and establis*y*ment of a county road along the south shore of Lake Chelan from a point in the interior of Lot 3,

Section 3, Township 27 N., R. 21 E., W. M., at survey station 420 plus 96.5 of South Lake Shore Road as established and of record, and running thence in a general northwesterly direction a distance of approximately 1.3 miles to survey station 488 plus 00.9, an interior point in the SW.¼ NE.¼ of Section 4, Township 27 N., R. 21 E., W. M., being a point of intersection with the Twenty-five Mile Creek Road,—to be a public necessity and declaring the intention of said Board to lay out and establish said road and directing the County Engineer to report upon said project, all in accordance with Chapter 173, Session Laws of Washington, 1925.

IV.

That thereupon the County Engineer made an examination of said proposed road and a survey thereof, and made a report to said Board in writing, as required by law, in which report the County Engineer found, among other things, said proposed road to be practicable and the construction thereof to be a public necessity, and filed with said report a map of the proposed road, as required by law, together with his field notes and profiles of such survey. And that thereafter and on the 30th day of October, 1928, the Board of County Commissioners of Chelan County set the matter of the laying out and establishment of said road and the report of the [87] County Engineer thereon, for hearing on November 23, 1928, at the office of the Board of County Commissioners in the courthouse at We*ant*chee, Washington, and caused notice of

said hearing to be posted and published in the form and for the length of time provided by law.

V.

That on the said 23d day of November, 1928, a public hearing on the laying out and establishment of said road and upon the report of the County Engineer thereon, was held by said Board of County Commissioners, and the said Board made and entered its order finding said road to be a public necessity and establishing the said road as a public highway, on the route designated and described in the report of the said County Engineer. It was and is further provided by said order of the Board of County Commissioners on November 23, 1928, that the Prosecuting Attorney for Chelan County be directed to proceed under the power of eminent domain to acquire such lands and other property or property rights as may be necessary for such new highway in the manner provided by law for the taking of private property for public use, and commence and prosecute to a conclusion condemnation suits for the acquisition of property and rights of way for said new highway as so laid out and established.

VI.

That petitioner has been unable to agree with the respondents for the purchase of the right of way hereinafter described, and in order to construct the said highway upon the route laid out and established by the said Board of County Commissioners, it is necessary for the petitioner to acquire a right

of way for highway purposes, more particularly described as follows, to wit:

A road right of way 60 feet in width over and across Lot 5, Section 4, T. 27 N., R. 21 E., W. M., particularly located and described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence [88] N. 35° 11′ W., 240.6 feet more or less to the south boundary line of said Lot 5 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line. From the initial point, as hereinabove described, continue thence N. 35° 11′ W., 30 feet; thence on a 2° curve to the left having a central angle of 6° 28′ a distance of 323.5 feet more or less to the west line of said Lot 5 of Section 4, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 0.49 acres more or less.

Also, a road right of way over and across the northeast corner of the SW.¼ of the SW.¼ of Section 3, T. 27 N., R. 21 E., W. M., being only that part of the right of way of the South Lake Shore Extension Road that overlaps the

said SW.¼ of the SW.¼ of said Section 3, and being more particularly described and located as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said sections 3 and 4 a distance of 1976.6 feet; thence S. 85° 07′ E., 240.7 feet; thence S. 51° 32′ E., 640.5 feet; thence S. 85° 48′ E., 809.1 feet; thence S. 48° 50′ E., 752.4 feet; thence on a 6° curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW.¼ of the SW.¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running south from the initial point as hereinabove described, following the east boundary line of said SW.¼ of the SW.¼ of Section 3, to a point 30 feet distant from the survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a curve having a radius of 985 feet, being parallel and 30 feet distant from survey alignment curve at this place, to the north boundary line of said SW.¼ of the SW.¼ of Section 3; thence east following the north boundary line of said SW.¼ of the SW.¼ of Section 3, to the initial point and place of beginning, which described parcel of land contains 0.02 acre more or less.

VII.

That the object for which this proceeding is brought is to ascertain and determine the compensation to be made in money, to the owner or owners, respectively, and to all tenants, encumbrancers and others interested, for the taking or injuriously affecting the lands, real estate, premises and other property above described in the manner above set forth, and for a release from all liability for all damages to the adjoining lands of the respondents not taken, in any manner arising from the taking of the above-described property and the construction of a public highway thereon.

VIII.

That the object for which said lands, real estate, premises and other property are sought to be appropriated, acquired and injuriously affected by your petitioner is a public object and use, [89] and that the public interest requires the construction of the said highway upon the above-described right of way, and the said lands, real estate, premises and other property sought to be appropriated and injuriously affected are required and necessary for the *o*aying out, establishment and construction of said highway.

IX.

That the following are the names of each and every owner, encumbrancer and person or party interested in the above-described property, or any part thereof, so far as the same can be ascertained from the public records or otherwise, namely, Alice

Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown).

X.

That in order to acquire title to said property above described, it is necessary for the petitioner to condemn said property and to acquire the same for the public purposes aforesaid by appropriate proceedings under and by virtue of the power of eminent domain conferred upon the petitioner in common with other like corporations in and by the laws of the State of Washington, and the petitioner has made said petition for said purposes.

Pursuant to the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW.

That the public interest requires the prosecution of the enterprise of the petitioner, and that the land, real estate and premises sought to be appropriated in the above-entitled cause is required and necessary for the purpose of the construction of said public highway. [90]

ORDER.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the contemplated use for which the lands, real estate and premises herein are sought to be appropriated is a public use, and that the public interest requires the construction of the highway mentioned in said petition, and that the lands, real estate and premises herein sought

to be appropriated and the interest of the above-named respondents therein to the extent herein provided, is required and necessary for the purpose of the construction of said highway, and that said petitioner is entitled to take said lands, real estate and premises and the interest of the respondents therein to the extent herein provided, for a right of way for highway purposes, under and by virtue of the power of eminent domain upon the payment of just compensation to the respondents herein, to be determined according to law.

The lands, real estate and premises, and the interest in the lands, real estate and premises hereby authorized to be taken as a right of way for highway purposes are more particularly described as follows, to wit: [91]

> A road right of way 60 feet in width over and across Lot 5, Section 4, T. 27 N. R. 21 E., W. M., particularly located and described as follows, to wit:
>
> Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the south boundary line of said Lot 5 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following

described line. From the initial point, as hereinabove described, continue thence N. 35° 11′ W., 30 feet; thence on a 2° curve to the left having a central angle of 6° 28′, a distance of 323.5 feet more or less to the west line of said Lot 5 of Section 4, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 0.49 acres more or less.

Also, a road right of way over and across the northeast corner of the SW¼ of the SW¼ of Section 3, T. 27 N., R. 21 E., W. M., being only that part of the right of way of the South Lake Shore Extension Road that overlaps the said SW¼ of the SW¼ of said Section 3, and being more particularly described and located as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said sections 3 and 4 a distance of 1976.6 feet; thence S. 85° 07′ E. 240.7 feet; thence S. 51° 32′ E., 640.5 feet; thence S. 85° 48′ E., 809.1 feet; thence S. 48° 50′ E., 752.4 feet; thence on a 6° curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW¼ of the SW¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running south from the initial point as hereinabove described, following the east boundary line of said SW¼ of the SW¼ of

Section 3, to a point 30 feet distant from the survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a curve having a radius of 985 feet, being parallel and 30 feet distant from survey alignment curve at this place, to the north boundary line of said SW¼ of the SW¼ of Section 3; thence east following the north boundary line of said SW¼ of the SW¼ of Section 3, to the initial point and place of beginning, which described parcel of land contains 0.02 acre more or less.

Done in open court this 23d day of June, 1930.

J. STANLEY WEBSTER,
Judge. [92]

[Title of Court and Cause—No. L.–4502.]

VERDICT.

We, the jury in the above-entitled cause, find for the respondents in the sum of $50.00.

EUSTACE LE MASTER,
Foreman.

Filed Nov. 20, 1930. [93]

Filed Dec. 15, 1930.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. L.–4502.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

ALICE BARBEE WICK and THEODORE S. TETTEMER and JANE DOE TETTEMER, His Wife (True Christian Name Unknown),

Respondents.

JUDGMENT ON VERDICT.

This cause coming on regularly for trial before the above-entitled court, Honorable J. Stanley Webster, Judge thereof and before a jury, at the courtroom of the above-entitled court in the city of Spokane, State of Washington, the petitioner appearing by its attorney, J. A. Adams, and the respondents Alice Barbee Wick and Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown), failing to appear in person or by attorney, and it appearing to the court that an order adjudicating public use and necessity has heretofore been entered herein, and a jury having been sworn to try the issues of the case and having returned its verdict making an assessment of damages to the re-

spondents herein by reason of the appropriation and use of the property described in the petition herein, and the court being satisfied by proof that all parties interested in the land and premises described in the petition of the petitioner and hereinafter described, have been served with notice herein as required by law, and being further satisfied by competent proof that the contemplated use for which said land, real estate, premises or other property is sought to be appropriated is a public use, namely: a right of way for the county road and public highway described in the petition herein, which road has been duly and regularly established by proper proceedings by and before the County Commissioners of Chelan County, Washington, and the court having accordingly made and entered herein its order of adjudication of [94] public use and necessity for appropriation,—

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that just compensation be paid by Chelan County, Washington, to the owners of said property, and to all tenants, encumbrancers and others interested, for the taking and injuriously affecting such land, real estate and premises, in the sum of Fifty Dollars ($50.00) with costs to the respondents in the sum of $———.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said respondents, Alice Barbee Wick and Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown), do have and recover from Chelan County, Washington, said sum for the taking and appro-

priating of the lands, real estate and premises for the uses set forth in the petition on file herein, and upon payment by said Chelan County, Washington, of said just compensation and damages to the respondents, or upon depositing the same for the use and benefit of the respondents with the Clerk of the above-entitled court to be paid out under the direction of said court or the Judge thereof, that the property hereinafter described, and the title thereto, free and clear of any and all encumbrances of any nature whatsoever, shall pass to and become vested in Chelan County, Washington, a municipal corporation.

The property, and title thereto, for a right of way for highway purposes hereby condemned and appropriated to the use of said Chelan County, Washington, are situated in said Chelan County, State of Washington, and particularly described as follows:

> A road right of way sixty (60) feet in width over and across Lot Five (5), Section Four (4), Township Twenty-seven (27) North, Range Twenty-one (21), E., W. M., particularly located and described as follows, to wit:
>
> Tying to the section corner common to Sections 3, 4, 9 and 10, Township 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the south boundary line of said Lot 5 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and

place of beginning of this description. Thence a strip of [95] land 30 feet wide on the right side and 30 feet wise on the left side of the following described line: From the Initial point, as hereinabove described, continue thence N. 35° 11′ W. 30 feet; thence on a 2° curve to the left having a central angle of 6° 28′, a distance of 323.5 feet more or less to the west line of said Lot 5 of Section 4, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 0.49 acre more or less.

Also, a road right of way over and across the northeast corner of the SW¼ of the SW¼ of Section 3, T. 27 N., R. 21 E., W. M., being only that part of the right of way of the South Lake Shore Extension Road that overlaps the said SW¼ of the SW¼ of said Section 3, and being more particularly located and described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said sections 3 and 4 a distance of 1976.6 feet; thence S. 85° 07′ E. 240.7 feet; thence S. 51° 32′ E., 640.5 feet; thence S. 85° 48′ E., 809.1 feet; thence S. 48° 50′ E., 752.4 feet; thence on a 6° curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW¼ of the SW¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a

line running south from the initial point as hereinabove described, following the east boundary line of said SW¼ of the SW¼ of Section 3, to a point 30 feet distance from the survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a curve having a radius of 985 feet, being parallel and 30 feet distance from survey alignment curve at this place, to the north boundary line of said SW¼ of the SW¼ of Section 3; thence east following the north boundary line of said SW¼ of the SW¼ of Section 3, to the initial point and place of beginning, which described parcel of land contains 0.02 acre more or less.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon such payment being made by said Chelan County, Washington, a decree shall be entered in accordance herewith and releasing said Chelan County, Washington, from any and all liability to the respondents and to any and all persons having or claiming to have any interest in and to the property described herein, for any and all damages to the lands and property above described, and to any and all lands lying contiguous or adjacent to said lands hereinabove described, in any manner arising from or to grow out of the taking of the property herein described, or the laying out, establishment, construction, maintenance, or operation of a public highway thereon, and that said Chelan County, Washington, shall be and become the owner of the said above-described tracts or parcels of land, real [96] estate and premises for the

purpose of constructing, maintaining and operating a public highway thereon, and shall be entitled to enter into possession of the same for said purposes, and that such payment as herein ordered and directed shall be payment in full for the taking, condemnation, appropriation and use of the same.

Done in open court this 15th day of December, 1930.

J. STANLEY WEBSTER,
Judge. [97]

[Title of Court and Cause—No. L.–4502.]

MEMO IN ACCORDANCE WITH ITEM 13 OF APPELLANT'S PRAECIPE.

Chelan County Warrant in the sum of $80.00 received by the Clerk, U. S. District Court, December 1, 1930.

Said sum credited on the Books of the Clerk, U. S. District Court in the above-entitled cause, December 26, 1930. [98]

Filed Dec. 15, 1930.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. L.–4502.

CHELAN COUNTY, WASHINGTON, a Municipal Corporation,

Petitioner,

vs.

ALICE BARBEE WICK and THEODORE S. TETTEMER, and JANE DOE TETTEMER, His Wife (True Christian Name Unknown),

Respondents.

DECREE OF APPROPRIATION.

This cause coming on regularly for hearing upon the application of petitioner herein, for a decree of appropriation of the property mentioned in the petition on file herein, and it appearing to the Court that heretofore a verdict was duly rendered in the above-entitled cause in favor of respondents, Alice Barbee Wick and Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown), in the sum of Fifty Dollars ($50.00) and that thereafter a judgment was duly and regularly entered upon said verdict in favor of the respondents and against the petitioner in said sum, and costs; and it further appearing to the Court that said petitioner has heretofore deposited with the

Clerk of the above-entitled court the said sum of Fifty Dollars ($50.00) and Thirty Dollars ($30.00) taxed as costs for the benefit of said respondents to be paid out under the direction of this court or the Judge thereof,—

Now, on motion of J. A. Adams, attorney for the petitioner, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there is hereby appropriated and granted to and vested in the above-named petitioner Chelan County, Washington, a municipal corporation, for its corporate purposes, a right of way for highway purposes in and to the following described property, lands, and premises, situate in the County of Chelan, State of Washington, to wit: [99]

A road right of way sixty (60) feet in width over and across Lot 5, Section 4, T. 27 N., R. 21 E., W. M., particularly located and described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said Sections 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the south boundary line of said Lot 5 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line. From the initial point, as herein-

above described, continue thence N. 35° 11′ W., 30 feet; thence on a 2° curve to the left having a central angle of 6° 28′, a distance of 323.5 feet more or less to the west line of said Lot 5 of Section 4, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 0.49 acre more or less.

Also, a road right of way over and across the northeast corner of the SW¼ of the SW¼ of Section 3, T. 27 N., R. 21 E., W. M., being only that part of the right of way of the South Lake Shore Extension Road that overlaps the said SW¼ of the SW¼ of said Section 3, and being more particularly located and described as follows, to wit:

Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N., R. 21 E., W. M., and run thence N. 0° 44′ E., following the section line between said sections 3 and 4 a distance of 1976.6 feet; thence S. 85° 07′ E. 240.7 feet; thence S. 51° 32′ E., 640.5 feet; thence S. 85° 48′ E., 809.1 feet; thence S. 48° 50′ E., 752.4 feet; thence on a 6° curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW¼ of the SW¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running south from the initial point as hereinabove described, following the east boundary line of said SW¼ of the SW¼ of Section 3, to a point 30 feet distance from the

survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a curve having a radius of 985 feet, being parallel and 30 feet distance from survey alignment curve at this place, to the north boundary line of said SW¼ of the SW¼ of Section 3; thence east following the north boundary line of said SW¼ of the SW¼ of Section 3, to the initial point and place of beginning, which described parcel of land contains 0.02 acre more or less.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Chelan County, Washington, a municipal corporation, be and it hereby is released from any and all liability to the respondents herein and to any and all persons having or claiming to have any interest in and to the property described herein, or lying contiguous or adjacent thereto, for any and all damages in any manner arising from and to grow out of the taking of said property or the laying out, establishment, construction, maintenance or operation of a public [100] highway thereon. That said Chelan County, Washington, a municipal corporation, is entitled to enter into the immediate possession of said property, and that the said payment hereinabove referred to is and shall constitute full compensation for the taking, condemnation, appropriation, and use of the property, lands and premises herein described.

Done in open court this 15th day of December, 1930.

J. STANLEY WEBSTER,
Judge. [101]

[Title of Court and Cause—No. L.–4502.]

SUBSTITUTION OF ATTORNEYS.

To the Clerk of the Above-entitled Court:

Enter our appearance as attorneys of record for respondents in the above-entitled cause, reserving special appearance heretofore made herein.

Dated at Spokane, Washington, March 5th, 1931.

BERKEY & COWAN,
Attorneys for Defendants.
P. O. Address: 204–6 Wall St.,
Bank Bldg., Spokane, Washington.

Filed Mar. 5, 1931. [102]

[Title of Court and Cause—No. L.–4502.]

PETITION FOR LEAVE OF COURT TO FILE MOTION FOR NEW TRIAL.

To the Honorable J. STANLEY WEBSTER, Judge of the Above-entitled Court:

Comes now the respondents by their counsel, Messrs. Berkey & Cowan, and still reserving their special appearance herein, respectfully request this Honorable Court to grant them leave to file a motion for a new trial of the above-entitled cause.

This petition will be based upon the records and files in the above-entitled cause and upon the affida-

vit of Chas. F. Cowan, one of defendants' attorneys, hereto attached and made a part hereof.

BERKEY & COWAN,
Attorneys for Defendants.
P. O. Address: 204–6 Wall St.,
Bank Bldg., Spokane, Washington. [103]

United States of America,
Eastern District of Washington,
County of Spokane,—ss.

Chas. F. Cowan, being first duly sworn on oath, says: That affiant is one of the attorneys of record for the defendants in the above-entitled action, substitution of said attorneys of record having been made on March 5th, 1931. That J. D. Campbell, the former attorney of record for said defendants, died on or about January 10, 1930. That affiant was not employed to represent said defendants in the above cause until February 28th, 1931, and after the time fixed by rule of this court within which to file motion for a new trial, but within the term and within three months from the date of the entry of judgment in said cause, all of which will more fully appear by the records and files herein.

CHAS. F. COWAN.

Subscribed and sworn to before me this 5th day of March, 1931.

[Seal] JAMES A. LYBECKER,
Notary Public in and for said County and State,
Residing at Spokane, Wash.

Filed Mar. 5, 1931. [104]

[Title of Court and Cause—No. L.–4502.]

ORDER DENYING MOTION FOR LEAVE TO FILE MOTION FOR NEW TRIAL.

This matter coming on for hearing upon the petition of Messrs. Berkey & Cowan, attorneys for respondents, for leave to file a motion for new trial of the above-entitled cause, and the Court being fully advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED, that said motion be, and the same is hereby denied, to which respondents except and their exceptions are hereby allowed.

Dated this 6th day of March, 1931.

J. STANLEY WEBSTER,
Judge of the United States District Court.

Filed Mar. 6, 1931. [105]

[Title of Court and Cause—No. L.–4502.]

PETITION FOR APPEAL AND ORDER GRANTING SAME.

To Chelan County, Washington, a Municipal Corporation, and to J. A. Adams and Sam M. Driver, Attorneys for Appellee:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that Margaret Rosborough and Alice Barbee Wick, respondents in the above-entitled cause, hereby appeal to the United States

Circuit Court of Appeals for the Ninth Circuit, from the verdict of the jury awarding damages, judgment of the court thereon, and decree of appropriation, entered in the above-entitled cause on December 15th, 1930, and from the whole thereof.

That your petitioners file herewith their assignments of error based upon the record and intended to be urged by them on this, their appeal.

That your petitioners pray that their said appeal be granted and allowed and that citation issue herein as provided by law and that an order be made filing the amount of the bond to be given by your petitioners upon appeal; and, that a transcript of the record, proceedings [106] and papers, upon which said order, verdict and judgment were made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

ALICE BARBEE WICK,
THEODORE S. TETTEMER and
JANE DOE TETTEMER, His Wife
(True Christian Name Unknown),
Appellants,
By BERKEY & COWAN,
Their Attorneys.

District of Washington,
County of Chelan,—ss.

Service of the within petition for appeal is hereby acknowledged in Wenatchee, Washington,

in said District, this 7th day of March, 1931, by the receipt of a copy thereof.

J. A. ADAMS and
SAM M. DRIVER,
Attorneys for Chelan County, Washington, Petitioner.

The petition granted, and the appeal allowed upon respondents giving bond conditioned as required by law in the sum of $500.00.

Dated at Spokane, Wash., March 10th, 1931.

J. STANLEY WEBSTER,
Judge of the United States District Court.

Filed Mar. 10, 1931. [107]

[Title of Court and Cause—No. L.–4502.]

ASSIGNMENTS OF ERROR.

Alice Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, his wife (true Christian name unknown), respondents in the above-entitled action, by Messrs. Berkey & Cowan, their attorneys, having filed notice of appeal as provided by law, that the respondents appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the verdict of the jury, judgment and decree of appropriation rendered thereon, on the 15th day of December, 1930, now make and file in support of said appeal, the following assignment of errors, upon which they will rely for reversal thereof.

I.

WANT OF JURISDICTION.

1. That the Court has no jurisdiction over the persons or property of the respondents, for the reason that the requirement of a once a week for two consecutive weeks publication of notice against nonresident owners in condemnation proceedings, by Acts approved March 21, 1890, page 294, and being Section 7647 of Pierce's Code of the State of Washington, is inadequate and confiscatory and contrary to the Constitution of the United States, and particularly paragraph 1 of the 14th Amendment thereof. [108]

II.

THAT THE PROPERTY OF RESPONDENTS IS BEING TAKEN WITHOUT DUE PROCESS OF LAW.

1. That the notice of petitioner's motion to have said case set for trial on Monday, May 26th, 1930, at 10:00 o'clock A. M. was received by respondents by mail at Philadelphia, Pennsylvania, on May 23d, 1930, thereby giving respondents insufficient time to appear, or to be represented thereat.

2. That the only notice of hearing for order of necessity was by registered mail and not received by respondents at Philadelphia, Pennsylvania, until May 31st, 1930, stating said cause had been set for hearing on June 5th, 1930, at 10:00 o'clock A. M. and did not give respondents sufficient time to appear and defend the same.

3. That notice of trial was likewise served upon respondents by mail, the same being received by

respondents at Philadelphia, Pennsylvania, on November 3d, 1930, stating that said case had been set for trial on November 20th, 1930, at 10:00 o'clock A. M., which did not give respondents sufficient time to prepare for trial and defend said cause.

4. That said notices were also served upon one Adrien W. Vollmer, who was not an attorney of record for these respondents or either of them, and who did not reside at Lakeside, Washington, as stated in said notices, and did not in anywise represent respondents.

III.

That the Court erred in denying respondents' motion to quash and in refusing to hold the following statutes of the State of Washington, void, as depriving respondents (now appellants), of due process of law secured by Paragraph 1 of the Fourteenth Amendment of the Constitution of the United States, to wit: Acts [109] approved March 13th, 1899, Chapter 94, p. 147, particularly Section 1, p. 147; March 17, 1903, Chapter 173, p. 360, particularly Section 2, p. 362; March 15, 1907, Chapter 159, p. 349, particularly Section 1, p. 349.

IV.

That the Court erred in denying appellants' motion to make more definite and certain, or in the alternative for a bill of particulars.

V.

That the Court erred in overruling appellants' demurrer.

VI.

INSUFFICIENCY OF THE RECORD TO JUSTIFY THE VERDICT AND THE JUDGMENT AND DECREE RENDERED THEREON AND THAT THE SAME IS AGAINST LAW.

1. That the Commissioners' proceedings, upon which the verdict and judgment are bases, are fatally defective and incomplete as shown by the record in this case.

2. That no showing is made in said Commissioners' proceedings, or the surveyors' report that any offer or statements of damages was made to respondents, or either of them prior to commencement of condemnation proceedings.

3. That it appears from Engineers' Report, that the survey for the road, was made on April 27th, and April 28th, May 12, 21, 22, June 22 and July 3, 1928, which was prior to and not in pursuance of the order of the County Commissioners directing such survey on October 30th, 1928, and as required by Chapter 173, Laws of 1925, and more particularly Section 3, thereof, of the Laws of the State of Washington. [110]

4. That the Commissioners' proceedings do not show that the prosecuting attorney was ordered to commence condemnation proceedings as provided for by Chapter 173, of the Laws of 1925, and more particularly Section 5 thereof, of the Laws of the State of Washington.

5. That the Commissioners' proceedings were not signed and sealed by the County Commissioners,

and attested by their Clerk, as required by Laws 1893, and on page 252 thereof, and approved March 10, 1893, and particularly Section 1663, of Pierce's Code of the State of Washington.

6. That the lands sought to be taken by the decree of appropriation, are incorrectly described, and vary from the surveyor's plat and field notes thereof on file herein.

7. That the award of damages was not paid in to the Clerk of the Court, prior to the entry of decree of appropriation and as provided for therein, and contrary to the provisions of Article 1, Section 16, of the Constitution of the State of Washington.

8. That no segregation or separate statement of damages was made to respondents in the verdict or judgment thereon, for their respective lands taken or damaged.

VII.

That the Court erred in entering a judgment on the verdict which purports to convey the fee to the road in question, rather than an easement for road purposes, as authorized by the provisions of Chapter 173, of the Laws of 1925, approved Jan. 15, 1926,

Dated at Spokane, in said Eastern District of Washington, this 6th day of March, 1931.

BERKEY & COWAN,
Attorneys for Respondents,
P. O. Address: 204–6 Wall St. Bank Bldg.,
Spokane, Washington. [111]

District of Washington,
County of Chelan,—ss.

Service of the within assignment of errors in hereby acknowledged in Wenatchee, Washington, in said District, this 7th day of March, 1931, by the receipt of a copy thereof.

J. A. ADAMS and
SAM M. DRIVER,
Attorney for Chelan County, Washington, Appellee.

Filed Mar. 10, 1931. [112]

Filed Mar. 23, 1931.

[Title of Court and Cause—No. L.-4502.]

AMENDED AND SUPPLEMENTAL ASSIGNMENTS OF ERROR.

Come now the respondents and present the following additional assignments of error in support of their appeal herein, and herewith request the Clerk to include the same in the transcript of the record on appeal.

VIII.

That the Court erred in refusing respondents' motion to quash and to set aside the pretended notice of filing and of hearing of the petition in condemnation; said motion being upon the ground, *inter alia,* that the condemnation statutes of the State of Washington, upon which these condemna-

tion proceedings were based, particularly that portion thereof (Session Laws of 1890, p. 295, Sec. 2, Pierce's Code, Section 7646) relating to notice and service upon nonresident owners is inadequate as to manner and time, and without due process of law, and is thus and otherwise contrary to Sections 3 and 16 of Article I, of the Constitution of the State of Washington, and the Fourteenth Amendment to the Constitution of the United States. [113]

IX.

That the Court erred in refusing to hold that certain eminent domain statute of the State of Washington, entitled by an Act to regulate the mode of proceeding to appropriate lands by corporations, approved March 21, 1890, Laws of 1890, p. 294, and laws amendatory thereof, are contrary to Sections 2, 3, and 16 of Article I of the Constitution of the State of Washington, and Section 2, Article VI, and the Fourteenth Amendment of the Constitution of the United States.

X.

That the Court erred in refusing to hold that the eminent domain statutes of the State of Washington are contrary to the provisions of the Constitution of the State of Washington, and the Constitution of the United States, and the Amendments thereto, and deny to these respondents their constitutional rights guaranteed to them thereunder.

XI.

That the Court erred in holding that the taking

of respondents' lands was for a public use and the entering of an order of necessity therein, and the same is contrary to respondents' rights under the Fourteenth Amendment of the Constitution of the United States.

XII.

That there is nothing in the record of the above-entitled cause, showing that jurisdiction was acquired over respondent, Alice Barbee Wick, either by personal service, or by description of any property belonging to her.

XIII.

That the Court erred in refusing respondents leave to file their motion for a new trial, because the same was tendered within the term, and within three months from the entry of judgment. [114]

XIV.

That the pretended service of notice upon one Adrian W. Vollmer was void and of no effect, for the reason that said Adrian W. Vollmer was not an attorney of record for respondents, or either of them, that he was not personally served with process or notice, and did not reside at Lakeside, Washington, and was not a resident of the State of Washington, and had not even visited therein, for a period of 23 months prior thereto.

For these errors, and the errors contained in the original assignments of error, these appellants, pray that the order of necessity, judgment on the verdict, and the decree of appropriation, entered in the above-entitled cause be reversed and set

aside, and a judgment rendered in favor of appellants, and for their costs.

BERKEY & COWAN,
Attorneys for Appellants,
P. O. Address: 204–6 Wall St. Bk. Bldg.,
Spokane, Washington.

State of Washington,
County of Spokane,—ss.

Chas. F. Cowan, being first duly sworn on oath, deposes and says: That I am one of the attorneys for appellants in the above-entitled cause, a citizen of the United States and of the State of Washington, above the age of twenty-one years: That I served the within amended and supplemental assignments of error in the above-entitled cause upon the appellee, Chelan County, Washington, a municipal corporation, on the 23d day of March, 1931, by depositing a true copy thereof properly sealed in an envelope for transmission thru the mail with postage fully prepaid thereon addressed to attorneys J. A. Adams and Sam M. Driver, Wenatchee, Washington, the attorneys of record for said appellee on said 23d day of March, 1931, and that there is a regular mail communication between said Spokane, Washington, and said Wenatchee, Washington.

CHAS. F. COWAN.

Subscribed and sworn to before me this 23d day of Mar., 1931.

[Notary Seal] R. E. PORTERFIELD,
Notary Public, Residing at Spokane, Washington.

[115]

[Title of Court and Cause—No. L.–4502.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Alice Barbee Wick and Theodore S. Tettemer, appellants above, as principal, and United States Fidelity & Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized to transact business in the State of Washington, and fully qualified to execute bonds and undertakings in any and all federal courts of the United States of America, as surety, are held and firmly bound unto Chelan County, appellee, its successors and assigns, in the full and just sum of Five Hundred ($500.00) Dollars, for the payment of which sum, well and truly to be made, the principals hereby bind themselves, their heirs, administrators, executors, and the said surety company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this sixth day of March, A. D. 1931.

WHEREAS, in the District Court, of the United States in and for the Eastern District of Washington, Northern Division, in a proceeding in said court between Chelan County, Washington, a municipal corporation, as petitioner, and Alice Barbee Wick and Theodore S. Tettemer et ux., as respondents, a judgment and decree were entered in favor of said petitioner and against the [116] said respond-

ents, on the 15th day of December, 1930, and the said Alice Barbee Wick and Theodore S. Tettemer et ux., appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit,—

NOW, THEREFORE, the condition of the above obligation is such that if the said appellants, shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation is void; else to remain in full force and virtue.

ALICE BARBEE WICK. (Seal)
THEODORE S. TETTEMER. (Seal)
UNITED STATES FIDELITY AND GUARANTY COMPANY.
[Seal] By GUY E. FRANKENFIELD,
Attorney-in-fact.

Attest: ————————.
————————.

This bond is approved as to form, amount and sufficiency of surety this 10th day of March, 1931.

J. STANLEY WEBSTER,
United States District Judge.

Filed Mar. 10, 1931. [117]

[Title of Court and Cause—No. L.-4502.]

CITATION ON APPEAL.

United States of America,—ss.

To Chelan County, Washington, a Municipal Corporation, and to J. A. Adams, and Sam M. Driver, Your Attorneys, GREETING:

You are hereby cited and admonished to be and

appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Eastern District of Washington, Northern Division, wherein the respondents in the above-entitled cause are appellants, and you as petitioner in said cause, are appellee, to show cause, if any there be, why verdict, judgment and decree mentioned in said appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable J. STANLEY WEBSTER, the United States District Judge, this 10th day of March, 1931.

J. STANLEY WEBSTER,
United States District Judge. [118]

District of Washington,
County of Chelan,—ss.

Service of the within citation on appeal is hereby acknowledged in Wenatchee, Washington, in said District, this 11th day of March, 1931, by the receipt of a copy thereof.

J. A. ADAMS,
SAM M. DRIVER,
Attorneys for Chelan County, Washington, Appellee.

Filed Mar. 12, 1931. [119]

[Title of Court and Cause—No. L.-4502.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please make up and certify to the Circuit Court of Appeals, Ninth Judicial Circuit, the following papers and records in the above-entitled cause, together with maps of surveys:

1. Appellants' transcript.
2. Special appearance and motion to quash.
3. Order denying motion to quash.
4. Demurrer, preserving special appearance.
5. Motion to make more definite and certain, etc.
6. Order denying motion and bill of particulars, and overruling demurrer.

6½. Motion for setting case.

7. Proofs of mailing notices of hearings and trial.
8. Affidavit of Adrian Winston Vollmer and affidavit of mailing.
9. Transcript of Commissioners' proceedings.
10. Findings of fact, conclusions of law, and order of public necessity.
11. Verdict.
12. Judgment on verdict. [120]
13. Date of Clerk's receipt of award.
14. Decree of appropriation.
15. Substitution of attorneys.
16. Petition for leave to file motion for new trial.
17. Order denying same.
18. Petition for appeal, and order allowing same.
19. Assignment of errors.

20. Bond on appeal and approval hereof.
20½. Citation.
21. This praecipe.
22. Name and P. O. Address of Attorneys.
23. Index.

BERKEY & COWAN,
Attorneys for Appellants,
P. O. Address: 204–6 Wall St. Bk. Bldg.,
Spokane, Washington.

District of Washington,
County of Chelan,—ss.

Service of the within praecipe for transcript of record is hereby acknowledged in Wenatchee, Washington, in said District, this 11th day of March, 1931.

J. A. ADAMS,
SAM M. DRIVER,
Attorneys for Chelan County, Washington, Appellee.

Filed Mar. 12, 1931. [121]

[Title of Court and Cause—No. L.–4502.]

AMENDED PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will include in the record of the above-entitled cause the stipulation of the attorneys for the respective parties with reference to statement of

evidence and praecipe on appeal, together with the original citation on appeal.

BERKEY & COWAN,
Attorneys for Appellants.

State of Washington,
County of Spokane,—ss.

Chas. F. Cowan, being first duly sworn on oath, deposes and says: That I am one of the attorneys for appellants in the above-entitled cause, a citizen of the United States and of the State of Washington, above the age of twenty-one years: That I served the within amended praecipe in the above-entitled cause upon the appellee, Chelan County, Washington, a municipal corporation, on the 18th day of March, 1931, by depositing a true copy thereof properly sealed in an envelope for transmission thru the mail with postage fully prepaid thereon addressed to attorneys, J. A. Adams and Sam M. Driver, Wenatchee, Washington, the attorneys of record for said appellee on said 18th day of March, 1931, and that there is a regular mail communication between said Spokane, Washington, and said Wenatchee, Washington.

CHAS. F. COWAN.

Subscribed and sworn to before me this 18th day of Mar., 1931.

[Seal] CHAS. B. VAN LIEU,
Notary Public Residing at Spokane, Washington.

Filed Mar. 18, 1931. [122]

[Title of Court and Cause—No. L.–4502.]

STIPULATION RE STATEMENT OF EVIDENCE.

IT IS HEREBY STIPULATED by and between J. A. Adams and Sam M. Driver, attorneys for petitioner, and Berkey & Cowan, attorneys for respondents, that the original statements of evidence in the above-entitled cause may be sent by the Clerk of the United States District Court for the Eastern District of Washington, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, without requiring the same to be printed.

IT IS FURTHER STIPULATED that the statement of evidence on order of necessity may be used jointly in cases Number L.–4501 and L.–4502.

IT IS FURTHER STIPULATED that for the purpose of appeal, that said causes Number L.–4501 and L.—4502 may be heard together, and the briefs in one case shall be considered in both, without the requirement of printing and filing separate briefs in each case.

J. A. ADAMS,
SAM M. DRIVER,
Attorneys for Petitioner.
P. O. Wenatchee, Washington.

BERKEY & COWAN,
Attorneys for Respondents.
P. O. Spokane, Washington.

Filed Mar. 17, 1931. [123]

[Title of Court and Cause—No. L.-4502.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, W. S. Coey, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages, numbered from 1 to 123, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above-entitled cause, as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals, as called for by the appellants in their praecipes, as the same remain of record, and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment and decree of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause, and the original statement of evidence referred to in the stipulation filed in this court on March 17, 1931. [124]

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of Twenty-seven and 40/100 Dollars ($27.40), and

that the said sum has been paid to me by Messrs. Berkey & Cowan, attorneys for respondents and appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district this 27 day of March, 1931.

[Seal] W. S. COEY,
Clerk. [125]

[Endorsed]: No. 6430. United States Circuit Court of Appeals for the Ninth Circuit. Alice Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, His Wife (True Christian Name Unknown), Appellants, vs. Chelan County, Washington, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed April 6, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit of Appeals for the Ninth Circuit.

In The United States Circuit Court of Appeals

IN AND FOR THE NINTH CIRCUIT

MARGARET ROSBOROUGH and ALICE BARBEE WICK,
Appellants
vs.
CHELAN COUNTY, WASHINGTON, a municipal corporation,
Appellee
No. 6429

ALICE BARBEE WICK, ,
THEODORE S. TETTEMER and JANE DOE TETTEMER, his wife, (true Christian name unknown)
Appellants
vs.
CHELAN COUNTY, WASHINGTON, a municipal corporation
Appellee
No. 6430

BRIEF FOR APPELLANTS

Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division.

BERKEY & COWAN
204-6 Wall St. Bank Bldg.
Spokane, Washington
Attorneys for Appellants

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In The United State Circuit Court of Appeals

IN AND FOR THE NINTH CIRCUIT

MARGARET ROSBOROUGH and
ALICE BARBEE WICK,
Appellants
vs.
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a municipal corporation,
Appellee
No. 6429

ALICE BARBEE WICK, ,
THEODORE S. TETTEMER and
JANE DOE TETTEMER, his wife,
(true Christian name unknown)
Appellants
vs.
CHELAN COUNTY, WASHINGTON,
a municipal corporation
Appellee
No. 6430

BRIEF FOR APPELLANTS

Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division.

BERKEY & COWAN
204-6 Wall St. Bank Bldg.
Spokane, Washington
Attorneys for Appellants

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

The two causes above-entitled were appealed from the District Court of the United States for the Eastern District of Washington, Northern Division, from the verdicts of a jury awarding damages, the judgments thereon and decrees of appropriation entered December 15, 1930, and from the whole thereof.

Under the stipulation of counsel on file, both causes will be heard together and briefs in the one case shall be considered in both without printing and filing separate briefs. (1st case—R. 131) (2d case —R. 139)

Full records have been made up and printed and separate findings and judgment will be asked in each case.

The records are alike in both cases except as to the parties and the land involved. For this reason references to the record refer to the cause first above, unless otherwise stated.

The appellants in the respective causes are all citizens of Pennsylvania and reside in Philadelphia, (1st case—R. 15-16); (2d case—R. 17-18). They made no appearance at the trials either in person or by attorney.

The controversies arose over the attempt of the County Commissioners of Chelan County, Washington, to establish a road along the southerly shore of Lake Chelan to be known as the "Change in South Lake Shore Extension Road", and for that purpose to condemn and take lands of these appellants under eminent domain. The situation and the proposed road are illustrated by the county engineer's maps in evidence as "Exhibit No. 4" and "Exhibit No. 5".

The proceedings to establish and condemn the road were an attempted compliance with Chapter 173, Session Laws of Washington, 1925, Remington's Comp. Stat. (1927 Supp.) Sec. 6447; (Pierce's Code Sec. 5992) and the eminent domain statutes of Washington, Remington's Comp. Stat. (1922) Secs. 921-929; (Pierce's Code, Sec. 7646-7655). The act and the Statutes are fully set forth in the Appendix.

The essential provisions of Chap. 173, L '25, are that county roads shall be established only as therein provided. The Board of County Commissioners by unanimous resolution entered in the minutes may declare its intention to lay out, establish or widen any county road and that same is a public necessity and direct the county engineer to report on the project. 2 Rem. Comp. Stat. (Sec. 6447-1)

Whenever directed, the County Engineer shall make an examination of the proposed route, and if

he deems it practicable, shall make a survey thereof, and report in writing to the Board, giving his opinion as to the necessity, terminals, length, width, cost and other important facts. He must also file a correct map of the survey with field notes and profiles. 2 Rem. Comp. Stat. (Sec. 6447-3)

The Board must then fix a time and place for hearing on the engineer's report, and give notice thereof by publication once each week for three successive weeks, and post same for 20 days at each of the termini. Such notice shall set forth the termini and width as recommended in the report, and that all persons interested may appear and be heard. On the day of hearing, upon satisfactory proof of the publication and posting of the notices, if the Board finds the road a necessity, it may then establish the same by resolution or order. 2 Rem. Comp. Stat. (Sec. 6447-4)

The County Engineer must then cause stone monuments to be placed at the termini. 2 Rem. Comp. Stat. Sec. 6447-4)

When directed by the Board, the Prosecuting Attorney must proceed under eminent domain to acquire such lands as may be necessary for such highway purposes. 2 Rem. Comp. Stat. (Sec. 6447-5)

The essential provisions of the Eminent Domain statutes of Washington (Remington's Comp. Stat.

Sec. 921-929) (Pierce's Code Sec. 7646-7655); are:

(Sec. 921) Any corporation authorized by law to appropriate land may present to the Superior Court in the county where the land lies, a petition which describes the land sought with *reasonable certainty*, setting forth the names of the owners, the object of the taking and praying for a jury to determine the just compensation.

(Sec. 922) A Notice, setting forth the object of the petition, a description of the land, and the time and place for presenting the petition to the Court. This Notice must be served on each owner named, at least ten days before the time in the notice set for hearing. The service must be made by delivering a copy of the notice to each owner who is resident of Washington, at his usual abode, or, if non-resident, or residence unknown, upon affidavit to that effect, service may be made by publication in any newspaper in the county once a week for two successive weeks, and such publication shall be deemed service upon each such non-resident. Proof of publication shall be made by affidavit filed with the clerk. Want of service of notice shall render the subsequent proceedings void as to the person not served.

(Sec. 925) At the hearing of the petition for condemnation upon proof of service of the Notice, and that the purpose contemplated is really a necessary

public use, the court may make a recorded order to the sheriff to summon a jury.

(Sec. 926) At such trial the jury shall ascertain, determine and award the amount of damages to be paid to each owner or owners respectively, irrespective of benefits, and upon the verdict of the jury judgment shall be entered for the amount of the damages awarded to such owner or owners respectively for the taking or injuriously affecting such land.

(Sec. 927) At the time of judgment for damages, whether upon default or trial, if the damages be then paid, or if not so paid then upon their payment, the Court shall enter a judgment or decree of appropriation of the right of way, thereby vesting the legal title in the corporation seeking same. A certified copy of such judgment or decree of appropriation shall be recorded in the deed records in the county and with like effect. If the title is found defective, the corporation may again institute the proceedings.

(Sec. 929) On entry of judgment upon the verdict of the jury, awarding damages, the petitioner may make payment thereof to the parties entitled, together with costs, by depositing same with the Clerk of Court to be paid out under direction of the Court or Judge thereof, and upon making such payment into court the petitioner shall be released from

all further liability. In case of appeal the money to remain in court until final determination.

STATEMENT OF FACTS

In attempted and pretended compliance with these provisions on Oct. 30, 1928, the County Commissioners passed a Resolution of intention to lay out and establish a "county road along the southerly shore of Lake Chelan in said County to be known as the Change in South Lake Shore Extension Road, beginning at an interior point in Lot 3 of Sec. 3, Twp. 27 N., R. 21, E. W. M. at survey station 420 plus 96.5 of South Lake Shore Road as established and of record, and ending at survey station 488 plus 00.9 (an inter-section with Twenty-five Mile Creek Road) in SW¼ NE¼ Sec. 4" in the same township and range, and directing the county engineer to make an examination and survey and report in writing to the Board. (R. 56-57)

The County Engineer on the same day that this Resolution was passed, filed a written report, field notes and map of a pretended survey. His certificates show that the survey was not made "when directed" but about four months prior thereto, namely, "April 27, 28, May 12, 21, 22, and June 22 and July 3, 1928" (R. 63 and R. 78)

On Nov. 2, 1928, an affidavit of one Larner certifies that on the day previous he had posted notices

of the hearing of the report of the engineer in the matter of the Resolution of County Commissioners et al for a county road to be known as So. Lake Shore Extension Road, as follows: "One notice on 4" pine tree 10 ft. to right of Sta. 422 plus 25; one notice on 5" pine tree 5 ft. to left of Sta. 449 plus 10; one notice on 4" pine tree 5 ft. to left of Sta. 487 plus 55." The affidavit does not state the location of the notices in either the section, township, range, county or state where in the land was situated. (R. 85)

On Nov. 22, 1928, one D. R. Stohl, principal clerk of the Wenatchee Daily World, made an affidavit that he had published a notice, thereto attached, of the place and time of the hearing, namely, Nov. 23, 1928. The affidavit states that the notice was published for 4 consecutive weeks but it disputes itself by showing it was first published on Nov. 1st and last on Nov. 22d, 1928, only 3 weeks. (R. 86-87)

Attached to the affidavit is a purported copy of the said Notice, in which the hearing is set for Nov. 23, 1928, three weeks after the first publication. This published notice of hearing on the engineer's report does not describe the land over which the road is to be built in such manner that an ordinarily well informed owner could know, without the aid of a surveyor, whether or not his land was effected. No other notice was ever given of the hearing, none was ever sent to appellants in Pennsylvania and none of

them appeared at the hearing. (R. 87-89)

On Nov. 23, 1928, the day set for the hearing, the Board of County Commissioners made an Order establishing the road 60 feet wide and as shown by the engineer's map, and stating the names of the owners. It did not direct the prosecuting attorney to commence condemnation. (R. 89-92)

After the Order of Establishment of the road, the second phase of the proceedings was entered, namely, for condemnation of the land subject to the established road. On January 5, 1929, the prosecuting attorney filed two suits in the Superior Court of Washington for Chelan County. The County was petitioner. The respondents were the appellants, respectively, in the two cases now before this Court. (1st case—R. 6-11) (2d case—R. 6-13)

The Petitions need not be here set out. They described the land to be condemned by metes and bounds. These descriptions are set out in the appendix. The descriptions were erroneous in both cases. In neither Petition does the center line of the road coincide with the center line as established by the Order of the County Commissioners.

On the same day suits were filed, Notices in condemnation were prepared by the prosecuting attorney and filed, in pretended and attempted com-

pliance with the condemnation law. The Notices were addressed to the respondents in the suits and set forth a statement of the establishment of the road. They also contained a purported description of the land to be taken. These descriptions are identical with those set forth in the Petitions in condemnation. They are therefore erroneous in both cases. They do not contain a description of the land to be taken. They describe land partly under the waters of Lake Chelan and not the same land covered by the Commissioners' Order of Establishment. (1st. case—R. 1-5); (2d case—R. 1-6).

On the same day also affidavits for publication were made and filed by Sam M. Driver, deputy county prosecutor, that the respondents were all non-residents and resided in Pennsylvania (1st case—R. 12-13); (2d case—R. 14-15).

Affidavits of publication by the principal clerk of the owner of the Wenatchee Daily World, filed on Jan. 30, 1929, show that the Notices in condemnation were published once each week for 4 consecutive weeks but also state specifically that the notices were published "beginning on the 7 day of January, 1929 and ending on the 28 day of January, 1929, both inclusive". It appears therefore, that the Notices were published for 3 weeks. The exact dates of publication are not disclosed. (1st case—R. 24-25); (2d case—R. 27-28).

Meanwhile, on January 25, 1929, the respondents, appellants here, appeared *specially* in both condemnation suits for the purpose only of removing the causes to the United States District Court for the Eastern District of Washington, Northern Division, and showed that the amount in controversy in each case exceeded $3,000, and that respondents were residents and citizens of Pennsylvania, whereas the petitioner, Chelan County, was a resident of the State of Washington. (1st case—R. 15-21); (2d case—R. 17-24). On January 30, 1929, orders of removal were made by said Superior Court, removing both causes to said District Court of the United States. (1st case—R. 31-33); (2d case—R. 35-36).

Special appearances were preserved and retained in the Federal Court and objections made to the jurisdiction of the Court over the persons of the respondents or the subject matter of the actions, wrile Motions to Quash were argued and denied (1st case—R. 36-40) (2d case—R. 40-44), and Demurrers to the petitions (1st case—R. 40-41) (2d case—R. 44-45) and Motions to make more definite and certain or for bills of particulars (1st case—R. 42-45) (2d case—R. 46-49) were argued, overruled and denied. (1st case—R. 45-46) (2d case—R. 49-50); all during the year 1929.

On May 8, 1930, the county prosecutor made and filed in both cases a motion to set the case for trial.

These motions were based upon affidavits of Sam M. Driver, deputy prosecutor, that respondents had appeared specially in the causes by their attorney, J. D. Campbell of Spokane and that prior to Feb. 10, 1930, Mr. Campbell had died; that one Adrian W. Vollmer residing at Lakeside, Chelan County, Washington, had on July 6, 1928, written a letter to the county commissioners (Plaintiff's Exhibit No. 8) giving the Philadelphia address of two of the persons who were afterward named respondents in these cases, and that by reason of such communication purported to represent these respondents as their attorney. (1st case—R. 46-49) (2d case—R. 50-53) Copies of this motion and affidavit were mailed to respondents in Philadelphia and to Mr. Vollmer at Lakeside, Washington, marked "please forward if necessary". (1st case—R. 49-50) (2d case—R. 53-54).

Hearing of the cases for June 5, 1930 was ordered and a notice thereof mailed by the Clerk to respondents in Philadelphia on May 26, 1930, nine days before the hearing. Notices were also mailed by the Clerk to said Vollmer, designating him as respondents' attorney. (1st case—R. 52) (2d case—R. 56), The record shows that Mr. Vollmer was not and never had been attorney for the respondents, that he did not reside in the State of Washington and had not visited therein for over 23 months. (1st case—R. 53) (2d case—R. 58) No notices of any nature were ever

sent to him until after the death of respondents' attorney, Mr. Campbell.

On June 5, 1930, the cases came on for hearing on the question of public use and necessity. The respondents did not appear and were not represented by counsel. The matters were tried together on evidence presented by the petitioner. Among other things, petitioner introduced as "EXHIBIT NO. 1" what purported to be a certified copy of all the proceedings before the Board of County Commissioners, as proof of the legal establishment of the road. (R. 56-93) But the same was certified by the deputy auditor as clerk of the Board of County Commissioners and the seal of the auditor affixed, instead of having been signed by the Commissioners, attested by their clerk and sealed with the seal of the County Commissioners, as provided by law. (2 Remington's Comp. Statutes, Sec. 4069). (Pierce's Code, Sec. 1663)

To prove the ownership of the lands involved, testimony was given by Sam M. Driver, deputy prosecutor, that he had examined abstracts and the records in the auditor's office and found that the only persons having any interest in the lands were the parties respondent in these causes. No further proof of ownership was made. (Transcript of Evidence of Hearing June 5, 1930—pp. 11-12).

On June 23, 1930, the Court made and entered

Findings of Fact, Conclusions of Law and Order of Public Use and Necessity, in each case, that public interest required construction of the road mentioned in the petition, and the lands of the said respondents were necessary for the highway and the petitioner was entitled to the land for a right of way for highway purposes under the power of eminent domain upon the payment of just compensation to the respondents, and describing the right of way identically, including errors, as described in the petition and Notice in the condemnation suits. (1st case—R. 93-102) (2d case—R. 99-109)

Following, on Nov. 20, 1930, a jury trial was had in each cause and damages were awarded to the respondents of $700.00 (1st case R. 103) and $50.00 (2d case—R. 109). The respondents were not present nor were they represented by counsel at said trials.

On December 15, 1930, Judgments on the verdicts were entered in each case, and it was ordered that upon payment of just compensation and costs to the respondents, or into court for their benefit, the title should vest in Chelan County free and clear of all encumbrances of any nature whatsoever, and describing the land to be taken identically, including errors, as it was described in the petition and published notices in the condemnation suits. (1st case—R. 103-108) (2d case—R. 110-115).

On the same day, namely, Dec. 15, 1930, the Court entered Decrees of Appropriation in each case, and after finding that judgments for $700 and costs, and for $50 and costs, in the two cases respectively, had been entered in favor of respondents, and that the amounts thereof had been deposited with the Clerk to be paid out under the direction of the Court, it was ordered that there be vested in Chelan County, a right of way for highway purposes in the land, which was then described; that Chelan County be released from all liability to owners and all other claimants by reason of the taking of the road; that Chelan County be let into immediate possession, and that the sums of $730 and $80 be full compensation for the land. (1st case—R. 109-112) (2d case—R. 116-119).

But the descriptions in these Decrees of Appropriation show the same errors that were made in the original Petition and in the published Notices, and throughout the condemnation proceedings. The land described is not the land intended for the road. Also, although the decrees recite that the money had been deposited in court, the record of the Clerk shows that only warrants and not money had been deposited. (1st case—R. 108) (2d case—R. 115). The decrees were entered without any notice to the respondents, and before the money was paid to respondents, contrary to the provisions of 2 Remington's Comp. Statutes, Sec. 927 (Sec. 7652 Pierce's Code) and

contrary to Art. 1, Sec. 16 of the Constitution of the State of Washington.

After a motion by respondents for new trials which were denied, (1st case—R. 112-114) (2d case—R. 120-122), petitions and orders were filed for appeals to this Court. (1st case—R. 115-127) (2d case—R. 122-135).

ASSIGNMENTS OF ERROR

I.

1. That the Court has no jurisdiction over the persons or property of the respondents for the reason that the requirement of a once a week for two consecutive weeks' publication of notice against non-resident owners in condemnation proceedings, by Acts approved March 21, 1890, page 294, and being Section 7647 of Pierce's Code of the State of Washington, is inadequate and confiscatory and contrary to the Constitution of the United States, and particularly paragraph I of the 14th, Amendment thereof.

II.

1. That the notice of petitioner's motion to have said case set for trial on Monday, May 26th, 1930, at 10:00 o'clock A. M. was received by respondents by mail at Philadelphia, Pennsylvania, on May 23d,

1930, thereby giving respondents insufficient time to appear, or to be represented thereat.

2. That the only notice of hearing for order of necessity was by registered mail and not received by respondents at Philadelphia, Pennsylvania until May 31st, 1930, stating said cause had been set for hearing on June 5th, 1930, at 10:00 o'clock A. M. and did not give respondents sufficient time to appear and defend the same.

3. That notice of trial was likewise served upon respondents by mail, the same being received by respondents at Philadelphia, Pennsylvania, on November 3d, 1930, stating that said case had been set for trial on November 20th, 1930, at 10:00 o'clock A. M., which did not give respondents sufficient time to prepare for trial and defend said cause.

4. That said notices were also served upon one Adrian W. Vollmer, who was not an attorney of record for these respondents, or either of them, and who did not reside at Lakeside, Washington, as stated in said notices, and did not in anywise represent respondents.

III.

That the Court erred in denying respondents' motion to quash and in refusing to hold the following statutes of the State of Washington, void as depriv-

ing respondents (now appellants) of due process of law secured by Paragraph 1 of the Fourteenth Amendment of the Constitution of the United States, to-wit: Acts approved March 13th, 1899, Chapter 94, p. 147, particularly Section 1, p. 147; March 17th, 1903, Chapter 173, p. 360, particularly Section 2, p. 362; March 15, 1907, Chapter 159, p. 349, particularly Section 1, p. 349.

IV.

That the Court erred in denying appellants' motion to make more definite and certain, or in the alternative for a bill of particulars.

V.

That the Court erred in overruling appellants' demurrer.

VI.

1. That the Commissioners' proceedings, upon which the verdict and judgment are based, are fatally defective and incomplete as shown by the record in this case.

2. That no showing is made in said Commissioners' proceedings, or the surveyors' report that any offer or statements of damages was made to respondents, or either of them, prior to commencement of Condemnation Proceedings.

3. That it appears from Engineers' report, that the survey for the road was made on April 27th, and April 28, May 12, 21, 22, June 22 and July 3, 1928, which was prior to and not in pursuance of the order of the County Commissioners directing such survey on October 30th, 1928, and as required by Chapter 173, Laws of 1925, and more particularly Section 3 thereof, of the laws of the State of Washington.

4. That the Commissioners' proceedings do not show that the prosecuting attorney was ordered to commence condemnation proceedings as provided for by Chapter 173, of the Laws of 1925, and more particularly Section 5 thereof of the laws of the State of Washington.

5. That the Commissioners' proceedings were not signed and sealed by the County Commissioners, and attested by their Clerk, as required by Laws 1893, and on page 252 thereof, and approved March 10, 1893, and particularly Section 1663, of Pierce's Code of the State of Washington.

6. That the lands sought to be taken by the decree of appropriation are incorrectly described, and vary from the surveyor's plat and field notes thereof on file herein.

7. That the description of the lands sought to be taken by the condemnation proceedings and decree of appropriation differ from and are at variance

with the published notice of hearing on change on South Lake Shore Extension Road dated October 31, 1928.

8. That the award of damages was not paid in to the Clerk of the court prior to the entry of decree of appropriation, and as provided for therein, and contrary to the provisions of Article 1, Section 16 of the Constitution of the State of Washington.

9. That no segregation or separate statement of damages was made to respondents in the verdict or judgment thereon for their respective lands taken or damaged.

VII.

That the Court erred in entering a judgment on the verdict which purports to convey the fee to the road in question, rather than an easement for road purposes, as authorized by the provisions of Chapter 173 of the Laws of 1925, approved Jan. 15, 1926.

VIII.

That the Court erred in refusing respondents' motion to quash and to set aside the pretended notice of filing and of hearing of the petition in condemnation; said motion being upon the ground, inter alia, that the condemnation statutes of the State of Washington, upon which these condemnations proceedings were based, particularly that portion thereof (Ses-

sion Laws of 1890, p. 295, Sec. 2, Pierce's Code, Section 7646) relating to notice and service upon non-resident owners is inadequate as to manner and time and without due process of law, and is thus and otherwise contrary to Sections 3 and 16 of Article 1, of the Constitution of the State of Washington, and the Fourteenth Amendment to the Constitution of the United States.

IX.

That the Court erred in refusing to hold that certain eminent domain statute of the State of Washington, entitled an Act to regulate the mode of proceeding to appropriate lands by Corporations, approved March 21, 1890, Laws of 1890, p. 294, and laws amendatory thereof, are contrary to Sections 2, 3 and 16 of Article 1 of the Constitution of the State of Washington, and Section 2, Article IV, and the Fourteenth Amendment of the Constitution of the United States.

X.

That the Court erred in refusing to hold that the eminent domain statutes of the State of Washington are contrary to the provisions of the Constitution of the State of Washington; and the Constitution of the United States, and the amendments thereto, and deny to these respondents their constitutional rights guaranteed to them thereunder.

XI.

That the Court erred in holding that the taking of respondents' lands was for a public use and the entering of an order of necessity therein and the same is contrary to respondents' rights under the Fourteenth Amendment of the Constitution of the United States.

XII.

That there is nothing in the record of the above-entitled cause, showing that jurisdiction was acquired over respondent, Alice Barbee Wick, either by personal service, or by description of any property belonging to her.

XIII.

That the Court erred in refusing respondents leave to file their motion for a new trial, because the same was tendered within the term, and within three months from the entry of judgment.

XIV.

That the pretended service of notice upon one Adrian W. Vollmer was void and of no effect, for the reason that said Adrian W. Vollmer was not an attorney of record for respondents, or either of them that he was not personally served with process or

notice, and did not reside at Lakeside, Washington, and was not a resident of the State of Washington, and had not even visited therein, for a period of 23 months prior thereto.

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED.

Assignments IV. and VI. relate to:

(a) Irregularity of the county commissioners' proceedings.

(b) That the record of the county commissioners' proceedings was not authenticated according to law and was improperly admitted in evidence.

(c) That the court was without jurisdiction by reason of the variance in the survey descriptions of the right-of-way described in the petitions and published notices with the survey description of the right-of-way of the established road and maps of the county engineer.

(d) The propriety of the entry of decrees appropriating the land to petitioners before the awards had been paid into court for the owners.

(e) Failure to segregate respondents' respective interests and award separate damages.

Assignments II. and XIV. relate to shortness of notice of hearings and trials, and pretended service of notice upon one not attorney for

respondents.

Assignment XI. relates to the point that the land condemned was not necessary for the public use.

Assignment IV. and VII. relate to the taking of the fee where an easement was sufficient for the purpose.

Assignment I. relates to the point that due process of law was not afforded appellants under the published notices, as provided by the statutes of the State of Washington.

Assignments III. V. VII. IX. and X. all relate to the point that the Act of Legislature, and the statutes of the State of Washington under which the condemnation of the land was sought are in conflict with ART III. sec. 2, ART. IV. sec. 2, Amendment ART. V. and Amendment ART. XIV. of the Constitution of the Constitution of the United States, and in conflict with Sections 2, 3, 16 and 32 of Art. I. and Section 19 of ART. II. of the Constitution of the State of Washington and does not constitute due process of law.

Assignment XII. relates to want of jurisdiction over respondent Wick, no personal service being had and no property owned by her described.

Assignment XIII. relates to abuse of discretion of the court in refusing to entertain motions for new trials.

ARGUMENT

INSUFFICIENCY OF THE COMMISSIONERS PROCEEDINGS

1. We contend that the record of the proceedings of the County Commissioners of Chelan County, upon which these condemnation proceedings are based, was improperly admitted as evidence of the legal establishment of the highway, that the same is fatally defective, and that it does not and cannot support the findings and judgments entered herein.

Sec. 3902, 2 Rem. & Bal. Code, (2 Rem. Comp. Stat. Sec. 4069) Pierce's Code Sec. 1663 provides:

> "The county commissioners of each county shall have and use a seal for the purpose of sealing their proceedings, and *copies of the same when signed and sealed by the said county commissioners, and attested by their clerk, shall be admitted as evidence of such proceeding in the trial of any cause in any court in this State;* and until such seal shall be provided, the private seal of the chairman of such board of county commissioners shall be adopted as a seal."

In the cases now before the Court, the petitioner's

"EXHIBIT NO. 1" being a certified copy of all proceedings before the board of county commissioners, bears the following certification: (R. 92-93)

"State of Washington,

County of Chelan, ss.

I, the undersigned Clerk of the Board of County Commissioners of Chelan County, State of Washington, do hereby certify that the foregoing is a true and correct copy of all proceedings before the Board of County Commissioners of Chelan County, Washington, in the matter of the establishment of South Shore Extension Road as of record in this office.

Witness my hand and official seal, this 4th day of June, 1930.

A. V. Shephard,

Deputy Auditor and Clerk of the Board of County Commissioners.

(Auditor's)
(Seal)

The late Judge Rudkin, in his memorandum opinion in the case of Chelan County v. Vollmer, et al, No. 1431 in the District Court of the United States, Eastern District of Washington, Northern Division, said in part:

". . . . The proceeding, of course, is statutory and it was incumbent on the petitioner to show that the highway, or county road, was legally established by its board of county commissioners before this proceeding was instituted. To prove

the legal establishment of the highway the petitioner offered in evidence a copy of the proceedings had before the board of county commissioners, which was certified to by the county auditor only."

"The proceedings before the board of county commissioners were not authenticated and certified in the mode prescribed by law, and the record of their proceedings was improperly admitted in evidence. The new trial must therefore be granted."

2. We contend that the Report of the County Engineer was utterly void. This report itself disclosed that he bases it upon his field notes of a survey which he began on April 27, 1928 and completed on July 3, 1928. (R. 78) The survey therefore was made many months prior to October 30, 1928, the date upon which he was directed by the county commissioners to make the same. The engineer filed his report, field notes and map, all on the same day upon which he was directed to so do, namely, October 30, 1928. A survey of the route was necessary and it would have been a physical impossibility to have made such survey, prepared the map and report to the Board, all within the same day. Obviously, the county engineer acted without authority in making the survey upon which his report and map are based, and obviously too he failed to ever make any survey or map thereof as he was so directed by the Commissioners' Resolution. Compliance with the law by the county engineer is jurisdictional. Sec. 2, Chap. 173,

Laws of 1925, provides:

> "*Whenever directed,* the county engineer shall make an examination of such proposed road and if necessary a survey thereof." and he "shall report thereon in writing to such board,..... He shall file with such report a correctly prepared map of such road as surveyed, which map must show the tracts of land over which said road passes, with the names, if known, of the several owners thereof, and shall file therewith his field notes and profiles of *such survey.*"

3. We challenge the sufficiency of the description of the published notice of hearing on the report of the county engineer. This notice makes no mention of the several tracts over which the proposed road will be established. The description in this notice which is set forth in full in the appendix, is in part as follows:

> "Commencing at survey sta. 420 plus 96.5 of So. Lake Shore Road, as of record being an interior point in Lot 3 of Sec. 3, Twp. 27 N., Rg. 21 E., W. M." running thence by courses and distances "and ending at survey sta. 488 plus 00.9 (an intersection with Twenty-five Mile Creek Road) being an interior point in SW¼ of NE¼ of Sec. 4, Twp. 27 N. Rg. 21 E:, W. M. the whole distance being about 1.3 miles, said road to be known as the So. Lake Shore Extension Road, all in Chelan County, Washington."
>
> "At said hearing any interested persons may appear and be heard for or against the establishment of the proposed change, in the South Lake Shore Road."

Without the aid of a surveyor, it would have been impossible for appellant Rosborough to know what property of hers it was proposed to take, and wholly impossible for appellants Tettemer and Wick to know whether or not any of their property would be affected. The notice is therefore void for uncertainty.

Fenton v. Minnesota Title Ins. etc Co., 15 N. D. 372, 125 Am. St. Rep. 599, 109 N. W. 366.

> "A published summons in a suit to quiet title which neither describes the land in controversy nor names the adverse claimants does not constitute due process against them, and a judgment taken against them is void, and subject to collateral attack."

Under Sec. 5, chap. 173. L. 1925, it was also necessary that the notice of hearing be posted at the termini of the proposed road. Nothing in the affidavit of posting shows upon what land notices were posted. (R. 85) There is no reference to the section, township, range, county or state, wherein the land was located. The affidavit shows that notices were as follows:

One notice on 4" pine tree 10 ft. to right of Sta. 422 plus 25.

One notice on 5" pine tree 5 ft. to left of Sta. 449 plus 10.

One notice on 4" pine tree 5 ft. to left of Sta. 487 plus 55.

4. Nowhere in the engineer's report or in the Commissioners proceedings does it appear that stone monuments were placed at the termini of the road as established, in accordance with Sec. 4, Chap. 173, L. 1925. (2 Rem. Comp. Stat. Sec: 6447-4)

Nowhere in the Commissioners' proceedings or in the engineer's report, does it appear that after passing the Resolution of intention to lay out and establish the road, the county made any effort to agree with the owners for the purchase of the right of way before bringing the condemnations, thus giving appellants no opportunity to either consider or negotiate a settlement of their damages.

Remington's Comp. Stat. Sec. 6780, provides that

> "Whenever the Board of County Commissioners shall find it necessary, for the purpose of straightening any permanent highway, lessening the gradients thereof, or otherwise improving the same to acquire or appropriate lands, real estate or other property, and are unable to agree with the owners thereof, upon the reasonable and fair value of such lands, real estate or other property, such board is hereby authorized to acquire the same by condemnation proceedings in the manner provided by law for the appropriation of lands, real estate or other property by private corporations authorized to exercise the right of eminent domain."

The burden is on petitioner that it endeavored but was unable to agree with the owner.

Oregon R. etc. Co. v. Oregon Real Estate Co., 10 Or. 444.

5. Furthermore, the county commissioners, neither in the Order of Establishment, nor elsewhere, directed the prosecuting attorney to proceed under the power of eminent domain, as alleged in the Petitions in condemnation, and as provided by Sec. 5, Chap. 173, L. 1925. (2 Rem. Comp. Stat. Sec. 6447-5)

INSUFFICIENCY OF THE NOTICES OF TRIALS

We further object to the shortness of notices given appellants in each of these cases. The notices for hearing for Order of Necessity the record shows (1st case—R. 52) (1d case—R. 56) were sent by the Clerk of the court by ordinary mail to the appellants addressed to Philadelphia, Pa., on May 26, 1930, stating that the hearing would be held on June 5, 1930 at 10:30 A. M. The Court will take judicial notice that the nine days allowed would all be consumed for the letter to reach Philadelphia and the recipient to reach Spokane, allowing no time for either consultation or preparation of a defense.

The same notice by ordinary mail was given appellants at the time of trial on damages, excepting that about twice the length of time was given.

In Illinois v. Pease, 207 U. S. 100, 52 L. Ed. 121, the Court said:

> "We know, because everyone knows, without the testimony of witnesses, that Kenosha, the place of the alleged crime, is only a short distance, within not more than one hour and a half travel by rail from Chicago."

and in U. S. v. Thornton, 160 U. S. 654, 40 L. Ed. 570,

> "In this case we are able to take judicial notice of the fact that claimant could not possibly have traveled from Mare Island to Washington and back within the four days which elapsed between his discharge and his re-enlistment."

46 C. J. 556, Sec. 62 and cases cited.

Attention is here called to the fact that notices were also mailed to one Adrian W. Vollmer, and that such notices designated him as "attorney for said parties (Lakeside, Washington)". The record shows that said Adrian W. Vollmer never was attorney for appellants, and by his affidavits (1st case R. 53-54) (2d case—R. 58) that he was not then nor had ever been or pretended to be counsel for appellants or any of them, or had ever appeared in these causes, and that he did not reside at Lakeside, Washington, and had not visited in the State of Washington for over 23 months. As a basis for its contention that said Vollmer was attorney for these appellants the peti-

tioner offered in evidence a letter written by him to the county commissioners on July 6, 1928, (Exhibit No. 8) many months prior to the Commissioners' resolution to lay out such a road. The letter reads as follows:

> First Creek Ranch, Lakeside, P. O.
> Chelan County, Washington,
> July 6th, 1928.
>
> Commissioners of Chelan County,
> Court House,
> Wenatchee, Washington.
> Gentlemen:
>
> Please note that the mail address of Miss Alice Barbee Wick and of Miss Margaret Rosborough is now:
>
> c/o Mr. Joseph B. Thomas, Suite 27, Transportation Bldg., 26 South 15th Street, Philadelphia, Pa.
>
> My temporary address is P. O. Box 1604, Spokane, Washington. Kindly send me copies of any notices or communications that you may send to either of above parties and kindly send them copies of any notices or communications sent to me.
>
> Thanking you in advance, I am
>
> Very truly yours,
> (signed) Adrian W. Vollmer

We submit that the above letter does not even hint that Mr. Vollmer was representing or intending to

represent appellants as counsel. The county admits that said Vollmer was not attorney for appellants by the fact that no notices of any nature were ever sent to him until after the death of J. D. Campbell, who was counsel for the appellants.

INSUFFICIENCY OF PROOF OF OWNERSHIP

1. We further challenge the sufficiency of the evidence offered to prove the alleged ownership of the lands condemned. The only evidence submitted on this point was the sworn testimony of Sam M. Driver, attorney for the appellee. (Transcript of Proceedings June 5, 1930, pp. 11-12) He testified as follows:

> "I am deputy prosecuting attorney of Chelan County, Washington, I have examined the certified abstracts of the property involved in these two condemnation proceedings, and also have checked them up in the records of the Auditor of Chelan County, Washington, and I found from my examination that the only persons having any interest in this land are, in the one case Margaret Rosborough (case No. 4501) and Alice Barbee Wicks. And in the other case, No. 4502, the only persons having any interest in the land involved in this case are Alice Barbee Wicks and Theodore S. Tettemer, and presumably his wife, Jane Doe Tettemer."

He makes no statement of what the interest of each is, whether as owner, joint owner, or encumbrancer. His statement of ownership does not coincide with the ownership of the tracts as

> shown by the Engineer's report. (R. 91). The deeds and the County Auditor's records are the best evidence of ownership.

2. Sec. 921 of Remington's Comp. Statutes provides that a jury ascertain and determine the compensation to be made in money to the owner or owners *respectively*, and the petitions in these cases so pray. No evidence was offered showing the respective interests of respondents nor did the jury apportion the damages.

TAKING THE FEE WHERE EASEMENT SUFFICIENT

The petitions in condemnation pray that a "judgment or decree be entered when said compensation shall have been determined to the effect that upon payment thereof. . . . *full title* to said property shall be at once vested in the petitioner" and the judgments provide that "upon payment by said Chelan County. . . . that the property. . . . *and the title thereto, free and clear of any and all encumbrances of any nature whatsoever*, shall pass to and become vested in Chelan County." The condemnor had no power to take the fee where an easement would satisfy the public needs.

> ". . . . where the statute does not prescribe the nature of the estate to be taken, only such estate may be taken by the condemnor as is sufficient to satisfy the purposes of the taking. The con-

demnation statutes are in derogation of the common law, and must be strictly construed. 68 A. L. R. p. 837.

Nichols on Eminent Domain, Sec. 150.

"....If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require...."

Seattle v. Faussett, 123 Wash. 613, 212 Pac. 1085.

Warm Springs Irr. Dist. v. Pacific Live Stock Co., 270 Fed. 560.

ENTRY OF DECREES BEFORE PAYMENT OF MONEY AWARD

We further submit that the Decrees of Appropriation entered in these causes should be set aside, for the reason that they were entered without notice to appellants, and before just compensation including interest and costs had been paid into court for them, as provided by Sec. 927, Remington's Compiled Statutes.

The decrees of appropriation were entered on Dec. 15, 1930, and although warrants had been deposited with the Clerk, by the petitioner the money to pay the judgments was not received by the Clerk until December 26, 1930. Payment by warrants did not constitute a payment of the award as prescribed by the statute.

ART. 1, Sec. 16, of the Constitution of the State of Washington provides that no private property shall be taken or damaged for public or private use without just compensation having first been made.

In State ex rel O. W. W. S. Co. v. Hoquiam, 155 Wash. 678, the court said:

> "The statute provides not that the award shall be paid to the Clerk of the Court by check, but shall be paid into court. The fair inference from the statute is that it contemplates payment in money and not by check. There appears to be no escape from the holding that the award was not paid into court in the manner prescribed by statute and upon notice to the opposite party and therefore the attempted payment by check to the clerk was ineffectual to suit the requirement of the statute.....The decree of possession and appropriation entered....will be set aside...."

In Peterson v. Smith, 6 Wash. 163, 32 Pac. 1050, the court said:

> "....Under the constitutional guaranty, the owner of the land appropriated in this case by the county could not be compelled to present a claim for damages. He can remain quiet and be assured that before his property is condemned the county must ascertain his damage and either pay it to him or pay it into court for his benefit...."

And in State ex rel Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385, where it was sought to sub-

stitute a bond for the actual payment of money, the court said:

> "A constitutional right is involved here. Sec. 16 of Art. 1 of the State constitution provides that 'no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner'. . . . viewed in any aspect of the case, whether taken by the sovereign or by the corporation under sovereign authority, it is a destruction of the constitutional guaranty for the protection of private property to appropriate it, without the consent of the owner, to a public use without first making compensation to him in money for the value of the property of which he has been deprived;"

ERRONEOUS DESCRIPTION OF THE PROPERTY

The Court had no jurisdiction to render the judgment and decrees of appropriation here appealed from for the reason that in each of these cases a fatal error was made in the description in the published notices. The trial court therefore obtained no jurisdiction over non-resident owners.

Laws for the condemnation of property for public use are to be strictly construed. Remington's Comp. Stat. Sec. 921 provides that there shall be "a petition in which the land, real estate, premises or other property sought to be appropriated shall be described with *reasonable certainty*."

In State ex rel Patterson, et ux. v. Superior Court for King County, 102 Wash. 331, 173 Pac. 186, the court held:

> "We are of the opinion that the *petitioner should be required to describe the land sought to be appropriated with all the certainty that is possible* in order to determine the land appropriated as condemned by actual survey. It is necessary also, in order that a jury of condemnation may know how much land is appropriated and to be paid for."

Nichols on Eminent Domain, Sec. 399:

> "This description should be, it is sometimes said, as accurate as is required in the case of a deed of land. At any rate it must be such that a surveyor could locate the parcel described without the aid of extrinsic evidence."

2 Lewis, Eminent Domain, 2d Ed. Sec. 307 and cases cited;

State ex rel Oregon, etc., v. Superior Court, 45 Wash. 321, 88 Pac. 334;

State ex rel Patterson v. Superior Court, *supra;*

People ex rel Eckerson v. Haverstraw, 137 N. Y. 88, 32 N. E. 1111;

Lexington Print Works v. Canton, 167 Mass. 341, 45 N. E. 746.

"Failure of the petition, complaint, or application

to thus describe the property, *or any uncertainty in this respect*, will vitiate the proceedings," 20 C. J. 954.

> In Glover v. Boston, 14 Gray (Mass.) 282, the court said
>
> "The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by the use of ambiguous or uncertain language. The presumption is in favor of the owner of the land, and every act done by public authority which interferes with his rights should be, as it always may be, clear and intelligible."
>
> Quoted with approval in Lexington P. Works v. Canton, *Supra.*

Remington's Comp. Stat. Sec. 922, provides that the Notice served upon the owner or published shall state briefly the objects of the petition and shall contain "a description of the land, real estate, premises, or property sought to be appropriated."

In Stafford vs. Multnomah County, etc. 108 Ore. 197, 204 Pac. 158, the court said:

> "It is a fundamental principle that when the land of an individual is sought to be condemned for public purposes a definite description of the property shall be given."
>
> * * * *
>
> "*It was the duty* of the defendant drainage district, if it would acquire a right of way over

> real property by eminent domain, so to describe the land it would take as to enable the landowner to know what part and how much of his land was about to be taken from him."
>
> * * * *
>
> "In the establishment of a public road, the owner of the land is advised as to the course of the highway, its width, the point of entrance upon his land and exit therefrom. He is thus enabled to know how much of his property has been taken for the purpose of a public highway, where situate, and is enabled to estimate his damage, if any.....In an action by the state, or by any of its agencies, designed for condemning real property, *the petition or complaint demanding condemnation must contain an accurate description of the property to be acquired.*"

The Court said in Daily v. Missouri Pac. Ry. Co., 170 N. W. 888, 103 Neb. 219,

> " a petition containing inaccurate statements that are material respecting the dimensions of the land affected will render condemnation proceedings void that are held thereunder."

and to the same effect is Union Terminal Ry. Co. v. Kansas, 60 Pac. 541.

In the Matter of the Application of the N. Y. C. & H. R. R. Co. to acquire certain lands of Elizabeth Rau, 70 N. Y. 191, the court held:

> "In proceedings of this character (condemnation) extreme accuracy is essential, for the pro-

tection of the rights of all the parties."

But in these condemnation cases, the land to be taken is not described with *reasonable certainty;* in the first case other land is described and in the second case the description contradicts itself and is so indefinite that the land cannot be located.

The land to be condemned must be the same land over which the road has been previously established by Order of the Board of County Commissioners.

> "After the establishing of *such highway,* the prosecuting attorney, when directed by the board of county commissioners, shall proceed under the power of eminent domain *to acquire such lands* and other property and property rights *as may be necessary for such highway* purposes in the manner provided by law for the taking of private property for public use." Chap. 173, L '25, sec. 5.

In these cases the petitioner does not describe the same land over which the road was established. In the Rosborough case the petition and published notice describe land which is not possible for any road, but the apparent assumption of the petitioner is that the land under the established road is the land condemned.

It is true that the error in the description as they appear in these condemnation proceedings are not apparent without analysis and deduction. But the Court will make the necessary calculation from the

evidence, and records in the cases.

City of Chicago v. Williams, 254 Ill. 360, 98 N. E. 666;

1 Elliott on Evidence, Sec. 36.

The Court will take judicial notice of the rules of mathematics and land surveying.

Stanton v. Hotchkiss, 157 Cal. 652, 108 Pac. 864;

Stephens v. Stephens, 108 Ark. 53, 156 S. W. 837:

1 Elliott on Evidence, Sec. 39.

The road as established by the final Order of the County Commissioners is based upon the report and map of the County Engineer. The initial point is the easterly terminus and the courses and distances are continuous to the west terminus. (R. 83-84) (Exhibits Nos. 4 and 5)

For convenience, the diagrams "A" and 'B" in the Appendix, compare the road as described in the proceedings before the County Commissioners, and the road rights of way as described in the Petition, published Notice and other proceedings in the condemnation suits. From these the errors will at once be seen.

These descriptions are also set out in the appendix.

In the condemnation proceedings, in the Rosbor-

ough case the courses and distances of the description as set forth in the petition and published notice coincide with the road as established by the County Commissioners from the western terminus eastward to a point near the northwest corner of Lot 2 in Sec. 3, (being Sta. 449 plus 90.1) of survey as shown on the engineer's map, "Exhibit No. 4." At that point, however, where the course in the county commissioners' proceedings recites "thence on a 16° 00′ curve to the right thru an angle of 47° 01′, 293.9 ft." in the petition and published notice and other records in the condemnation proceedings, a curve of *six* degrees has been substituted for one of *sixteen* degrees. The consequence of this substitution is to change the direction of the center line and throw the road and land to be taken for the right of way, north and east of the true course, so that if followed it would lead into Lake Chelan. The ultimate result is that the road will be built on land of appellants not condemned. Diagram "A" in the Appendix clearly shows this situation.

In the Wick-Tettemer case, the second described parcel of land to be taken was erroneously described, namely, a small triangular parcel. The description is so contradictory that the land cannot be located.

The known point from which the survey starts is the section corner common to Sections 3, 4, 9 and 10, in T. 27 N. R. 21 E. W. M., thence by various courses and distances which lead north and east out

into Lake Chelan and back again, and arrives at the initial point in the interior of Lot 2, Sec. 3, approximately 775 ft. east and 307 ft. south of the northeast corner of the SW¼ SW¼ of Sec. 3, and a considerable distance south of the route of the proposed road as established, by the county commissioners. Diagram "B" set out in the appendix shows this situation.

The description leading to the initial point is wrong in most of its statements. The system of error seems to have been to add to the straight length of the road the total length of the curve at each end. If half the curve length were used it would be nearer right, but even then would not be correct, for the distance around the curve is shorter than lines carried out straight to the intersection as used in the description.

Nowhere, except at the beginning and at the end does the description in this case, or in the Rosborough case, attempt to tie to any known point, although it is customary and the practice of surveyors to make reference to such points in order to verify the location.

In the Wick-Tettemer case, the initial point is described as being the "northeast corner of said SW¼ of the SW¼ of Section 3, the initial point and place of beginning of this description." Then follows a

description of a small tract whch ends with a point "30 feet distant from the survey line of said South Lake Shore Extension Road."

It is true that a monument or known point mentioned will prevail over a point located by measurement. But, the northeast corner of the SW¼ SW¼ of Sec. 3, is not marked by any monument. Neither is it a known point except that it is capable of ascertainment by measurement. But, the measurements given in this very survey purport to be an attempt to establish that point, commencing at a point that is known and established, namely, the section corner between sections 3, 4, 9 and 10. Who can say from the record which is the place?

The reference to "a point 30 ft. distant from the survey line of said South Lake Shore Extension Road" does not clear the confusion, because it is indefinite and because it is not shown whether the already existing road or the new proposed road was meant. The name of the new proposed road was not as stated in this description, but was as declared by order of the county commissioners in their Resolution of intention and in their Order of Establishment, and is "Change in South Lake Shore Extension Road."

From the foregoing, it is apparent that the description of this small tract as described in the peti-

tion and published notice in condemnation was wrong entirely, and not located in the new proposed road at all, and it is not apparent which of two different and widely separated points was intended and that therefore the land was not described with "reasonable certainty."

If the land was not described with reasonable certainty in the petition and published notices in condemnation, the requirements of the law were not fulfilled and the Court had no jurisdiction of the land, and could not make decrees in rem.

In the case of Toledo A. A. & N. R. Co. v. Munson, 57 Mich. 42, 23 N. W. 455, the court held:

> "Jurisdictional defects may be noticed at any stage of the proceedings, for the reason that if the court proceeds without jurisdiction, the whole proceedings are null and void; and it would be of no avail to send the matter back for further proceedings before the court or another jury. It is therefore proper here to point out, that the petition filed as the foundation of these proceedings. . . . was insufficient to confer jurisdiction, because it did not comply with the requirements of the statute prescribing what such petition should contain. The law requires that each distinct parcel of land shall be described, and the owner thereof, if known, shall be named."

On the other hand, no personal service of process in these proceedings was made on any of the appell-

ants. Special appearances were made in both cases, both at the time the cases were removed to the Federal Court, and in all subsequent motions, demurrers and proceedings these special appearances were preserved. The cases both went to trial upon the hearing of necessity and for fixing damages without appearance of the parties or representation by counsel. The Court therefore had no jurisdiction of the persons of the appellants and could enter no decrees in personam.

It follows that both judgments and decrees of appropriation are void.

INSUFFICIENCY OF PUBLISHED NOTICE TO CONSTITUTE DUE PROCESS OF LAW

The Eminent Domain Statutes of the State of Washington, under which these proceedings were brought, being Act of Mar. 21, 1890, p. 925, sec. 2, (Rem. Comp, Stat. sec. 922) provides that "*a notice*, stating briefly the objects of the petition, and containing a description of the land, real estate, premises or other property sought to be appropriated, and stating the time and place when and where the same will be presented to the court or judge thereof, *shall be served on each and every person named therein* as owner, encumbrancer, tenant, or otherwise interested therein, *at least ten days previous to the time designated in such notice for the presentation of such petition.* Such service shall be made by delivering

a copy of such notice to each of the persons or parties named therein, if a resident of the state;* * * *In all cases where the owner, or person claiming any interest in such real or other property, is a non-resident of this state, * * * service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks;* * * and such publication shall be deemed service upon each of such non-resident persons, * * * "*

There are two distinct things provided by this Statute; the first is a notice to be served at least ten days previous to the time of hearing; the second is publication of that notice once a week for two successive weeks, which is deemed service upon a non-resident.

Notices were issued January 5, 1929, by the prosecuting attorney for Chelan County, directed to the appellants, and the time of presentation to the Court was fixed as January 30, 1929 at 9:30 A. M.

The appellants, all being non-residents, service was made by publication in a newspaper published in Wenatchee, Washington. The affidavit of publication shows that publication began Jan. 7, 1929 and ended Jan. 28, 1929. The dates of publication do not appear.

As we interpret this Statute, publication would

have been made for a full two weeks from January 7, 1929, the first day of publication, and ending on January 21, 1929. This would have amounted to *service of the notice upon non-resident owners.* Then should have followed the ten days fixed by the Statute as the *length of the notice* to all owners and other interested persons. The statute provides: "*and such publication shall be deemed service upon such non-resident person.*" Service of what? It is clear that it means service of the ten days' notice which all owners and interested persons are to receive, which service became effective in the case of a non-resident, only upon the expiration of the publication. Service was not made until the two full weeks' or fourteen days' publication was complete. No action could be had or hearing fixed before ten days after the last day of the two weeks' publication.

In the case of Early v. Homans, 16 How. 610, construing a statute requiring publication of notice in a newspaper, the court held:

> ". . . . twelve successive weeks is as definite a designation of time, according to our division of it, as can be made.
>
> "When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks, as the happening of a fact which is to precede it, we mean that it may be done in twelve weeks, or eighty-four days, or, as the

case may be, that it shall not be done before." Approved in:

Leach v. Burr, 188 U. S. 510;
Market Natl. Bank v. Pacific Natl. Bank, 89 N. Y. 397;

Cox v. Northern Wisconsin Lumber Co. 82 Wisc. 141;

Foster v. Vehmeyer, 133 Calif. 459;
Auerbach v. Maynard, 26 Minn. 421;
Bond v. Penna. R. R. Co. 124 Minn. 195;
State v. Morrison 132 Minn. 454.

In the case of Appeal of Fred W. Meyer, 158 Minn. 433, it was said:

> "Where a statute requires notice of process to be served by publication for a stated number of weeks in the official newspaper, the service becomes complete a week after the last publication."

Assuming that publication was complete on January 21, 1929 this leaves only eight days' notice, excluding the date of hearing, or, nine days' notice including the date of hearing which was fixed for January 30, 1929 at 9:30 A. M., these cases should not have been heard before January 31, 1929, which was one day after the date actually fixed in the notices for hearing thereof, and therefore the whole proceedings were void as not complying with the statute and for that reason depriving these appellants of their property without due process of law, con-

trary to Amendment ART. XIV. Sec. 1, of the Constitution of the United States, and contrary to Sec. 3, of ART. 1, of the Constitution of the State of Washington.

Any other interpretation of this Statute would authorize a publication once a week for two successive weeks, which might be satisfied by a publication on two days seven days apart, and a hearing not earlier than ten days from the first publication. This would clearly be unreasonable notice to a non-resident, and particularly to one residing across the United States, as do these appellants, and a violation of due process of law and the equal protection of the laws guaranteed to them under Amendment ART. XIV. Sec. 1, of the Constitution of the United States, and Sec. 3 of ART. 1. of the Constitution of the State of Washington, and a violation of the rights, privileges and immunities guaranteed to them under ART. IV. Sec. 2, and ART. III: Sec. 2, of the Constitution of the United States.

Whether, under such an interpretation of this Statute due process would be assured non-residents, is in part dependent upon the facts of each case. The facts of the cases at bar are such as to have required a considerable time by way of notice for these appellants to have appeared and prepared for a defense of the cases. The appellants resided in Philadelphia, entirely across the continent from where the land

was located; it was a journey of five days between their homes and Wenatchee, where the Court sat. They were citizens of Pennsylvania, and were entitled to have their cases transferred to a Federal Court. Some preparation was needed for a trip of this character. Consultation with counsel and experts was reasonably necessary before undertaking the defense of such proceedings. Removal to the Federal Court required the preparation of a petition, giving bond, and giving notice to Chelan County of the application for removal. In Washington, the titled to at least three days' notice of any hearing, motion or application, and if served outside the rule is that parties appearing in an action are encounty then at least ten days' notice by mail is to be given.

Had the first issue of the paper containing the published notice been mailed at once to appellants, they would not have received same in the ordinary course of mail until the sixth day following. Had they immediately journeyed to Wenatchee by the usual means of travel, they would not have reached there until the eleventh or twelfth day. By the requirement of more than one publication in the newspaper the Legislature surely had in mind the possibility that the first publication might escape the attention of the land owner.

The provision in the statute that such notice may

be published in any newspaper published in the county imposes further hardship upon non-resident owners, the county of Chelan being as large as some of the smaller states.

Resident owners who are personally served with notice receive better protection than do non-residents served only by publication.

The statute makes no provision for the mailing of a copy of the notice to non-residents. Evidently the petitioner was doubtful of the sufficiency of the statute to give adequate or reasonable notice to non-residents because not only was the notice published more times than the statute required but copies of the notice were mailed to appellants. However, this cannot and does not take the place of due process of law.

> "This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."
>
> Central of Ga. Ry. Co. vs. R. R. Commission, 215 Fed. 427.

> "The law itself must save the parties' rights and not leave them to the courts as such."
>
> Louisville & Nashville R. R. Co. v. Stockyards Co. 212 U. S. 132.

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Roller v. Holly, 176 U. S. 398, 44 L. Ed. 520. "Nor can extra-judicial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires."

Coe v. Armour Fertilizer Works, 237 U. S. 413.

"Nor is the constitutional validity of a law to be tested by what has been done under it but rather by what may be done under it."

Chicago, Milwaukee & St. Paul Ry. Co. v. Board of Railroad Commissioners, 247 Pac. 162;

State ex rel. Redman v. Meyers, 210 Pac. 1064;

State ex rel. Holliday v. O'Leary, 115 Pac. 204.

"To admit that a method of service, whether it amounts to due process of law or not, is sufficient because it is prescribed by state statute, is to admit that a state may impair rights guaranteed by the National Constitution. The prohibitions of the constitution cannot be thus evaded."

Fayerweather v. Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193; 5 Ency. U. S. Sup. Ct. Rep. 627.

The protection of the Federal Constitution applies whatever the form in which the legislative power of the state is exerted, whether by a con-

stitution, an act of legislature, or any act of any subordinate instrumentality.

Standard Scale Co. v. Farrell, 249 U. S. 571.

In Chicago R. Co. vs. Chicago; 166 U. S. 226, the court said:

> "But a state may not, by any of its agencies disregard the prohibitions of the 14th Amendment.
>
> .....This court, in referring to the 14th Amendment, had said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation!' "

In Roller v. Holly, 176 U. S. 398, 44 L. Ed. 520, a Texas statute was held unconstitutional and not affording due process of law, where personal service was made on non-resident defendant in Virginia on December 30, 1890 to appear in Texas on January 5, 1891 The court said:

> "....it would have required four days of constant travel to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit.
>
> " That a man is entitled to some notice before he can be deprived of his liberty or property is

> an axiom of the law to which no citatian of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose."

And after reviewing the statutes of many states, the court proceeded to say:

> "It may be said in general with reference to these statutes that in cases of publication, notice is required to be given at least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and the return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient."

We wish to call the attention of the Court to other provisions of the Eminent Domain statutes of the State of Washington, subsequently enacted. Act approved Mar. 13, 1907, p. 316 L. '07 (Rem. Comp. Stat. sec. 9219) (Sec. 7549 Pierce's Code) applicable to service of process on non-resident owners or defendants, provides for service by publication as in *other civil actions.* The time and manner of service by publication in civil actions is as follows:

> "The publication shall be made in a newspaper printed and published in the county where the action is brought. . . . *once a week for six consecutive weeks.* . . . .and the *service* of the sum-

> mons *shall be deemed complete at the expiration* of the time prescribed for publication as aforesaid. . . . . The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons;. . . . ."
> (Rem. Comp. Stat. sec. 233) (sec 8446 Pierce's Code)

Sec. 57 of the Judicial Code, regulating procedure on the question of notice by publication, provides that where personal service on an absent defendant is not practical, the court may direct that the order shall be *published not less than once a week for six consecutive weeks.*

While we do not contend that these sections of the statute are controlling, or repeal the statute of eminent domain by private corporations, yet counties should be placed in no more favorable position than cities, and this should be taken into consideration by the court in determining whether due process has been given these appellants under their constitutional rights.

In the cases at bar, appellants *appeared specially* and objected to the jurisdiction of the court over them or their property, and questioned the constitutionality of the statutes by which they were pretended to have been brought into court. They participated neither in the consolidated trial on public

use and necessity nor in the separate trials on damages, in person or by counsel. Consequently, the appellee must strictly rely not only upon a full compliance with the statute as to service of notice but also upon the sufficiency of the statute itself to give adequate notice to non-resident owners. If the statute authorizing the service by publication does not afford due process of law, then no notice has been given appellants. We assert that the statute is either constitutional or unconstitutional. If unconstitutional, by reason of the fact that it does not provide a sufficient notice, it is wholly void as far as these appellants are concerned and can afford no ground for service by publication, and hence any proceedings thereunder are entirely irregular and do not constitute due process of law.

We urge the foregoing notwithstanding the decision of the court in State ex rel Woodruff v. Superior Court, 145 Wash. 129, 259 Pac. 379, and Wick v. Chelan Electric Co., 280 U. S. 108, because in neither of these cases did the court take into consideration that full ten days notice had not been given appellants after completion of the two weeks publication as required by the statute in question. Furthermore appellants in the cases at bar made special appearances and were neither present at nor participated in, either the hearing on necessity or the trial on damages. Therefore appellee must show not only that the statute has been strictly complied with, but

that the statute is adequate in itself to give due notice to appellants.

> McDonald v. Mabee 243 U. S. 90
> "Notice and an opportunity to be heard are essential requisites to the jurisdiction of all courts, even in proceedings in rem."
>
> Dorr v. Rohr. 82 Va. 359.

ERROR IN DENYING MOTIONS AND OVERRULING DEMURRERS

The District Court erred in denying the motions to quash and in overruling the demurrers to the Notices and Petitions and denying the motions to make more definite and certain or in the alternative for bills of particulars, for the reasons hereinbefore set forth.

The special appearances of appellants were maintained in the motions to quash and demurrers, and in all subsequent proceedings and exceptions duly made and allowed to the denial of these motions and orders.

It is held in the case of Cain v. Commercial Publishing Company, 232 U. S. 124, 58 L. Ed. 535, that a special appearance can be made and special appearance maintained for the purpose of raising the question of jurisdiction after the case has been removed from the state to the federal court.

ERROR IN REFUSING NEW TRIALS

The Court erred and abused its discretion in refusing to allow appellants to file their motions for new trials.

As disclosed by the affidavit accompanying the applications for leave to file motions for new trials, the same were presented within the term and within ninety days from the date of the entry of the judgments. Therefore, it was an abuse of discretion on the part of the court to deny such applications and refuse to consider the motions for new trials.

Mattox v. U. S. 146 U. S. 140,
56 L. Ed. 517;

Felton v. Spiro, 78 Fed. 576;

James v. Evans, 149 Fed. 136;

Pugh v. Bluff City Excursion Co. 177 Fed. 399;

Higgins v. U. S. 185 Fed. 710.

We respectfully submit that the Judgment and Decree of the District Court in each of these cases should be reversed and the proceedings dismissed.

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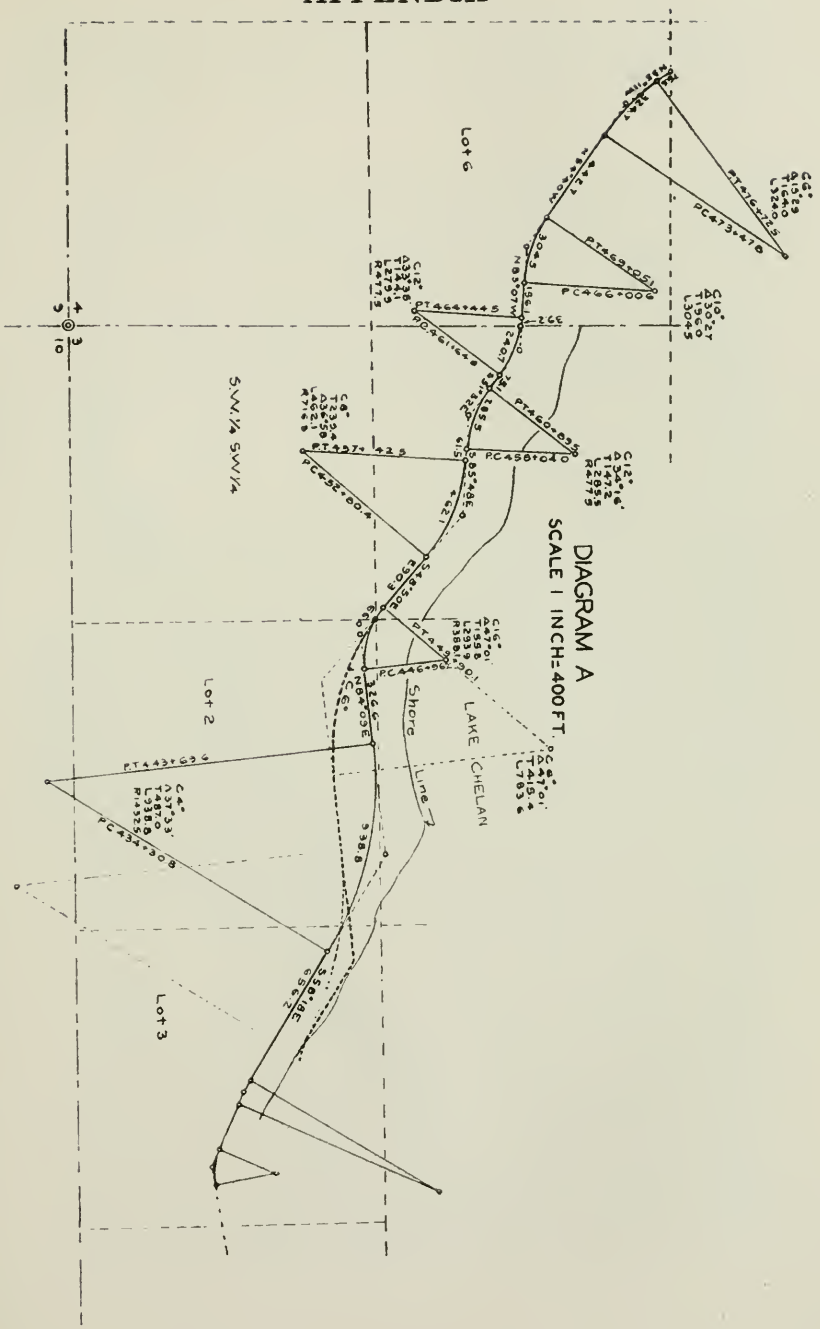

DIAGRAM A
SCALE 1 INCH = 400 FT.

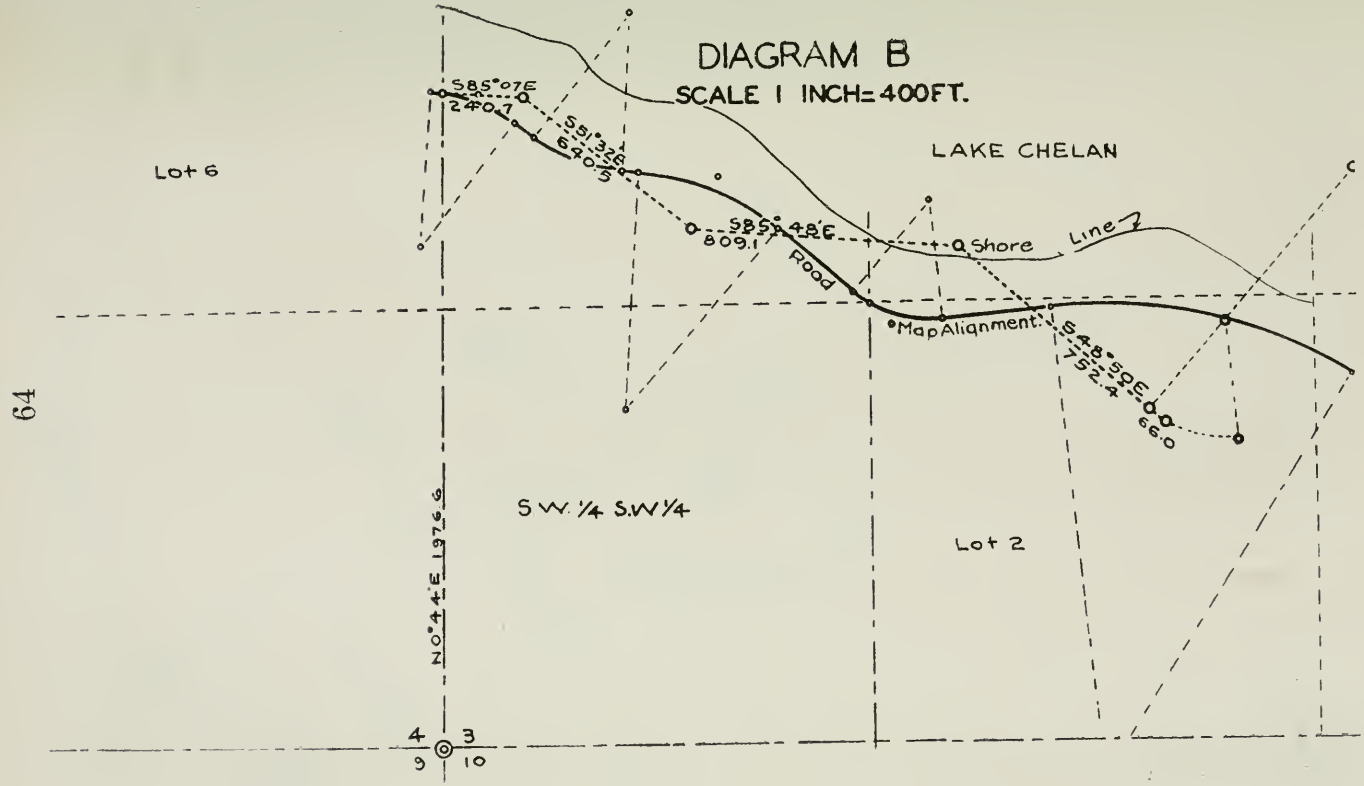
DIAGRAM B
SCALE 1 INCH=400FT.
LAKE CHELAN
Lot 6
S85°07E
2401
S51°32E
640.5
S85°48E
809.1
Road
Shore Line
Map Alignment
S48°55E
752.4
660
S.W. 1/4 S.W. 1/4
Lot 2
N0°44E 1976.6
4
3
9
10

64

Description of Road as contained in published notice of hearing upon the Report of the county engineer:

"Commencing at survey sta. 420 plus 96.5 of So. Lake Shore Road, as of record being an interior point in Lot 3 of Sec. 3, Twp. 27 N., Rg. 21 E., W. M. running thence from a course N. 63° 52′ W. on a 20° curve to left thru an angle of 35° 26′ 177.2 ft. thence S. 80° 42′ W. 3.5 ft. thence on a 21° curve to right thru an angle of 33° 41′, 160.4 ft; thence N. 65° 37′ W., 215.1 ft., thence on a 6° curve to right, thru an angle of 7° 19′, 121.9 ft.; thence N. 58° 18′ W. 656.2 ft.; thence on 4° curve to left thru an angle of 37° 33′, 938.8 ft.; thence S. 84° 09′ W., 326.6 ft.; *thence on a* 16° *curve* to the right thru an angle of 47° 01′, 293.9 ft.; thence N. 48° 50′ W., 290.3 ft.; thence on an 8° 00′ curve to left thru angle of 36° 58′, 462.1 ft., thence N. 85° 48′ W., 61.5 ft, thence on a 12° 00′ curve to right thru an angle of 34° 16′, 285.5 ft., thence N. 51° 32′ W., 75.1 ft.; thence on a 12° 00′ curve to left, thru an angle of 33° 35′, 279.9 ft.; thence N. 85° 07′ W., 156.1 ft.; thence on a 10° 00′ curve to right thru an angle of 30° 27′, 304.5 ft.; thence N. 54° 40′ W., 442.7 ft.; thence on a 6° 00′ curve to right thru an angle of 19° 29′, 324.7 ft.; thence N. 35° 11′ W., 106.6 ft.; thence on 2° 00′ curve to left thru an angle of 8° 09′, 407.5 ft.; thence N. 43° 20′ W., 231.9 ft.; thence on a 6° 00′ curve to right thru an angle of 15° 03′, 250.8 ft.; thence N. 28° 17′ W. 131.6 ft. and ending at survey sta. 488 plus 00.9 (an intersection with Twenty-five Mile Creek Road) being an interior point in SW¼ of NE¼ of Sec. 4, Twp. 27 N. Rg. 21 E., W. M. . . ."

(1st case—R. 83-84)
(2d case—R. 89-90)

Description of right-of-way as contained in Petition and notice in Chelan County v. Rosborough and Wick, (1st case) Appeal No. 6429.

"Tying to the section corner common to Sections 3, 4, 9, and 10, T. 27 N., R. 21 E.; W. M., and run thence N. 0° 44′ E., following the section line between said Section 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the north boundary line of said Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line. From the initial point, as hereinabove described, run thence S. 35° 11′ E., 76.6 feet; thence on a 6° curve to the left, having a central angle of 19° 29′ a distance of 324.7 feet; thence S. 54° 40′ E., 442.7 feet; thence on a 10° curve to the left, having a central angle of 30° 27′, a distance of 304.5 feet; thence S. 85° 07′ E., 156.1 feet; thence on 12° curve to the right, having a central angle of 33° 35′, a distance of 279.9 feet; thence S. 51° 32′ E., 75.1 feet; thence on a 12° curve to the left, having a central angle of 34° 16′, a distance of 285.5 feet; thence S. 85° 48′ E., 61.5 feet; thence on a 8° curve to the right, having a central angle of 36° 58′, a distance of 462.1 feet; thence S. 48° 50′ E., 290.3 feet; *thence on a* 6° *curve* to the left, having a central angle of 47° 01′, a distance of 293.9 feet; thence N. 84° 09′ E., 326.6 feet; thence on a 4° curve to the right, having a central angle of 37° 33′, a distance of

938.8 feet; thence S. 58° 18′ E., 656.2 feet; thence on a 6° curve to the left, having a central angle of 7° 19′, a distance of 121.9 feet; thence S. 65° 37′ E., 215.1 feet; thence on a 21° curve to the left, having a central angle of 33° 41′, a distance of 160.4 feet; thence N. 80° 42′ E., 3.5 feet to an interior point in Lot 3, Section 3, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 7.53 acres more or less according to survey thereof, not including however, that part of said right of way contained within the SW¼ of the SW¼ of said Section 3."

(1st case—R. 1-5)

Description of the second described portion of the right-of-way, as contained in Petition and Notice in Chelan County vs. Wick and Tettemer (2d case) Appeal No. 6430:

"Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N. R. 21 E. W. M., and run thence N. 0 degrees 44′ E., following the section line between said Sections 3 and 4 a distance of 1976.6 feet; thence S. 85 degrees 07′ E. 240.7 feet; thence S. 51 degrees 32′ E., 640.5 feet; thence S. 85 degrees 48′ E., 809.1 feet; thence S. 48 degrees 50′ E., 752.4 feet; thence on a 6 degree curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW¼ of the SW¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running south from the initial point as hereinabove described, following the east boundary line of said SW¼ of the SW¼ of Section 3, to a point

30 feet distant from the survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a curve having a radius of 985 feet, being parallel and 30 feet distant from survey alignment curve at this place, to the north boundary line of said SW¼ of the SW¼ of Section 3; thence east following the north boundary line of said SW¼ of the SW¼ of Section 3, to the initial point and place of beginning, which described parcel of land contains 0.02 acre more or less."

(2d case—R. 4)

CHAPTER 173

Session Laws of Washington, 1925.

PROCEDURE TO ESTABLISH COUNTY ROADS

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. (Sec. 5992, Sub. 2, Pierce's Code) County roads shall be laid out and established as provided in this act. The board of county commissioners by unanimous vote of such board may by resolution entered upon their minutes declare their intention to lay out and establish or widen any county road and that the same is considered a public necessity and shall direct the county engineer to report upon such project.

Section 3. (Sec. 5992, Sub. 4, Pierce's Code)

Whenever directed, the county engineer shall make an examination of such proposed road and if necessary a survey thereof. After examination, if he deems the same to be impracticable, he shall so report to the board of county commissioners without making any survey, or he may examine or examine and survey any practicable route which would serve such purpose. Whenever he shall consider any such road or modified route practicable he shall report thereon in writing to such board, giving his opinion (1) as to the necessity of the road; (2) as to the proper terminal points, general course and length thereof; (3) as to the proper width of the road, which shall be not less than thirty feet nor more than one hundred twenty feet, exclusive of slopes for cuts and fills: (4) as to the probable cost of construction of the road including all necessary bridges, culverts, clearing, grubbing, drainage and grading; (5) and such other facts, matters and things as he may deem of importance to be considered by such board. He shall file with such report a correctly prepared map of said road as surveyed, which must show the tracts of land over which said road passes, with the names, if known, of the several owners thereof, and shall file therewith his field notes and profiles of survey.

Section 4. (Sec. 5992 Sub. 5, Pierce's Code) The board of County commissioners shall fix a time and place for hearing upon such report and cause notice thereof to be published once a week for three suc-

cessive weeks in the county official newspaper and to be posted for at least twenty days at each of the termini of such road as recommended by the county engineer. Such notice shall set forth the termini and width of such road as recommended in such report and state that all persons interested may appear and be heard at such hearing upon such report and upon the matter of the establishment of such road. On the day fixed for such hearing, or adjourned hearing, the said board, upon due proof to the satisfaction of the board, made by affidavit, of due publication and posting of such notice of hearing, shall consider said report and all evidence relative to such establishment and, if said board finds that such proposed road is a public necessity, they may establish the same by resolution or other order. The cost and expense of such establishment and of the right of way thereof shall be paid from the general road and bridge fund, unless the board of county commissioners shall, in the order of establishment, direct that the same be paid from the fund of the particular road district or districts in which such road may be located. The county engineer shall cause stone monuments to be placed at the termini of all such roads.

Section 5. (Sec. 5992 Sub. 6, Pierce Code) After the establishment of such highway, the prosecuting attorney, when directed by the board of county commissioners shall proceed under the power of eminent domain to acquire such lands and other property and

property rights as may be necessary for such highway purposes in the manner provided by law for the taking of private property for public use.

REMINGTON'S COMPILED STATUTES of WASHINGTON, 1922.

Sec. 921 *Eminent Domain by Corporations-Petition, Requisites of.*

Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the superior court of the county in which any land, real estate, or premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, *a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records,* the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, *to such owner or owners, respectively,* and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record in the manner prescribed by law, then that the compensation to be

made, as aforesaid, be ascertained and determined by the court, or judge thereof, (Cf. L. '88 p. 58, sec. 1; L. '90, p. 294, sec. 1; 2 H. C., sec. 648).

Sec. 922. *Notice, Contents of and Service.* — A notice, stating briefly the objects of the petition, *and containing a description of the land, real estate, premises or property sought to be appropriated.* and stating the time and place when and where the same will be presented to the court, or the judge thereof, *shall be served on each and every person named therein as owner,* encumbrancer, tenant, or otherwise interested therein, *at least ten days previous to the time designated in such notice for the presentation of such petition.* Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other directors or trustee of such corporation. In case of minors or (on) their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor. In case of idiots, lunatics, or distracted persons, or their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is (state, school) or county land, the notice shall be served on the auditor of the

county in which the land, real estate, premises, or other property sought to be appropriated is situated. *In all cases where the owner or person claiming an interest in such real or other property is a non-resident of this state,* or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a non-resident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, *service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks;* and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest to the county in which lies the land sought to be appropriated. *And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown.* Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this article are instituted by the owner or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such owner, person, or party interested, or his, her, or its attorney. Such notice may be served by any competent person over twenty-one years of age. Due proof of service of such notice, by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties

having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this article may be made as the superior court, or the judge thereof, may direct. (Cf. L. '88 p. 58, Sec. 2; L. '90, p. 295, sec. 2; 2 H. C., Sec. 649)

* * * * *

Sec. 925. *Court to Adjudicate Necessity for Appropriation.—Calling Jury.* At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury. (Cf. L. '88, p. 60, sec. 4, L. '90, p. 297, sec. 4; 2 H. C., sec. 651; L. '97, p: 63, sec. 1)

Sec. 927. *Judgment and Decree of Appropriation—At the time of rendering judgment for*

damages, whether upon default or trial *if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated,* thereby vesting the legal title to the same in the corporation seeking to appropriate such land real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate, or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, and with like effect. If the title to shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this article provided. (Cf. L. '90, p. 298, sec. 6; L. '91, p. 84 sec. 1; 2 H. C. sec. 653.

Sec. 929. *Payment to Petitioner—On Appeal Money to Remain in Court...Upon the entry of judgment upon the verdict of the jury,* or the decision of the court, or judge thereof, awarding damages, as hereinbefore prescribed, *the petitioner,* or any officer of or any other person duly appointed by said corporation, *may make payment of the damages assessed* the parties entitled to the same, *and of the costs of the proceeding, by depositing the same with the clerk of said superior court,* to be paid out under the direction of the court, or judge thereof *and upon making such payment into the court of the dam*ages assessed and allowed, and of the costs to any

land, real estate, premises, or other property mentioned in said petition, such corporation shall be released and discharged from any and all further liability therefor, unless upon appeal the owner, or other person or party interested, shall recover a greater amount of damages; and in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal; provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. (L. '90, p. 299, Sec. 7; 2 H: C. Sec. 654.)

Pierce's Code 7549; Sec. 9219 Rem. Comp. Stat; Summons. Upon the filing of the petition aforesaid a summons, returnable as summons in other civil actions, shall be issued and served upon the person made parties defendant, together with a copy of the petition, as in other civil actions. And in case of any of them are unknown or reside out of the State, a summons for publication shall issue and publication be made and return and proof thereof be made in the same manner as is or shall be provided by the laws of the State for service upon absent defendants in other civil actions. Notice so given by publication shall be sufficient to authorize the Court to hear and determine the suit as though all parties had been sued by their proper names and had been personally served.

Pierce's Code, Sec. 8446. Sec. 233 Rem. Comp: Stat. Time and Manner of Service by Publication—Form. The publication shall be made in a newspaper printed and published in the county where the action is brought (and if there be no newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county then in a newspaper printed and published at the capital of the state) once a week for six consecutive weeks. Provided, That publication of summons shall not be had until after filing of the complaint; and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. The summons must be subscribed by the plaintiff or his attorney or attorneys. The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons; and said summons for publication shall also contain a brief statement of the object of the action. Said summons for publication shall be substantially as follows:

In the Superior Court of the State of Washington

for the County of.....

.....Plaintiff,

vs.

.....Defendant.

No.....

The state of Washington to the said (naming the defendant or defendants to be served by publication):

"You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to wit, within sixty days after the..... day of....., I....., and defend the above entitled action in the above entitled court, and answer the complaint of the plaintiff....., and serve copy of your answer upon the undersigned attorneys for plaintiff,..... at his (or their) office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the Clerk of said Court. (Insert here a brief statement of the object of the action.)"

.....

Plaintiff's Attorney

P. O. Address:..... .....

County ..... Washington

Pierce's Code Sec. 1663; Sec. 4069 (2) Rem. Comp. Stat. SEAL: The county commissioners of each county shall have and use a seal for the purpose of sealing their procedings, and cop-

ies of the same when signed and sealed by the said county commissioners, and attested by their clerk, shall be admitted as evidence of such proceedings in the trial of any cause in any court in this State; and until such seal shall be provided, the private seal of the chairman of such board of county commissioners shall be adopted as a seal.

ARTICLE I OF THE CONSTITUTION OF THE STATE OF WASHINGTON

Sec. 2 SUPREME LAW OF THE LAND. The constitution of the United States is the supreme law of the land.

Sec. 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property without due process of law.

Sec. 16. EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefore be first made in money, or ascertain-

ed and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question and determined as such, without regard to any legislative assertion that the use is public.

In The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Appellants,

vs.

CHELAN, COUNTY WASHINGTON, a municipal corporation,

Appellee.

No. 6429

And

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, his wife, (true Christian name unknown)

Appellants

vs.

CHELAN COUNTY, WASHINGTON, a municipal corporation,

Appellee

No. 6430

AFFIDAVIT OF MAILING OF BRIEFS

State of Washington
County of Spokane } ss.

I, CHARLES F. COWAN, being first duly sworn, depose and say that I am one of the attorneys of record for appellants in the above-entitled causes, now pending in the United States Circuit Court of Appeals for the Ninth Circuit wherein said persons are appellants and Chelan County, Wash., a municipal corporation, is appellee; that I served true and duly certified

copies of the appellants' Brief in said cases upon J. A. Adams and Sam M. Driver, attorneys of record in the said appeals for said appellee, by depositing in the United States Post-office at Spokane, Washington, on the .....day of August, 1931, two copies of said Brief, by registered mail, return receipt requested, special delivery postage fully prepaid, addressed to: "J. A. Adams and Sam M. Driver, Attorneys for Chelan County, Washington, Commercial Bank Building, Wenatchee, Washington," and the registered article receipt number ..... .hereto attached, was then and there issued to me by said post-office; and that on said.....day of August, 1931, I also mailed two copies of said Brief by ordinary mail to said attorneys, addressed to them as aforesaid, and with postage fully prepaid; that there is a regular mail communication between Spokane and Wenatchee, Washington.

CHARLES F. COWAN

Subscribed and sworn to before me this 11th day of August, 1931.

JAMES A. LYBECKER
Notary Public in and for the State of Washington, residing at Spokane

Notarial Seal
Commission Expires
May 16, 1933

In The United States Circuit Court of Appeals

IN AND FOR THE NINTH CIRCUIT

MARGARET ROSBOROUGH and ALICE BARBEE WICK, *Appellants* vs. CHELAN COUNTY, WASHINGTON, a municipal corporation, *Appellee*	No. 6429

and

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, his wife, (true Christian name unknown) *Appellants* vs. CHELAN COUNTY, WASHINGTON, a municipal corporation, *Appellee*	No. 6430

PETITION FOR REHEARING

Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division.

BERKEY & COWAN
Attorneys for Appellants
204-6 Wall Street Bank Bldg
Spokane, Washington

In The United States Circuit Court of Appeals

IN AND FOR THE NINTH CIRCUIT

MARGARET ROSBOROUGH and ALICE BARBEE WICK,
Appellants

vs.

CHELAN COUNTY, WASHINGTON, a municipal corporation,
Appellee

No. 6429

and

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, his wife, (true Christian name unknown)
Appellants

vs.

CHELAN COUNTY, WASHINGTON, a municipal corporation,
Appellee

No. 6430

PETITION FOR REHEARING

Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Comes now the appellants, Margaret Rosborough and Alice Barbee Wick in case No. 6429, and Alice Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, his wife, in case No. 6430, by their attor-

neys, Berkey & Cowan, and petition the above entitled court for a rehearing in the above entitled cases for the reasons and upon the grounds following:

I.

That the Court fails to fully take into consideration the position of appellants in not appearing at the trials on necessity and for damages. The court seems to take the position in its opinion that by reason of such failure to appeal and make objections to the evidence or make proper motions in regard thereto, that they cannot now take advantage of the same, or be placed in a more favorable position by reason of their failure to make such appearance. Our contention, however, in that regard is this, that having made and preserved special appearances in the above cases, which position is upheld by the Court in its opinion, it is incumbent upon and necessary for the appellee to affirmatively prove all facts necessary to sustain the jurisdiction of the Court to render a judgment or decree that would be binding upon these appellants and describe the property with reasonable certainty. This we submit they have not done, and we have sent up the evidence offered as a part of the record to show such facts. See Trans. pp. 56-93.

DESCRIPTION — CAUSE NO. 6429

The call of six degrees in the description in controversy is not such an error as can be readily demonstrated from the balance of the description for the reason that a curve of six degrees can have an angle of 47° 1′, although the distance in feet would not be 293.9, and for the further reason that a curve of six degrees could have a distance of 293.9 feet but the angle would not be 47° 1′. In short, that any one of the three might be the erroneous one, and there would be as much reason to correct one as the other, and that the only way a surveyor could know what was the real intention of the description would be with the aid of some other evidence than that furnished by the description. That the only way the erroneous quantity can be found is by plotting the same up to an accurate scale and by a closure with the boundary lines or termini mentioned. The description does not furnish the data from which the greater curve of sixteen degrees may be computed, as stated in the opinion, without such plotting and necessary tie-ins.

Mowbray vs. Allen, 58 N. J. L. 315, 33 A. 199.

> "Where the courses and distances of the return of the surveyors lay a public road through dwelling houses, the proceeding is absolutely defective, notwithstanding the map of the surveyors shows the road to be to one side of the

dwellings."

"One of the reasons relied upon is that the road, by said return, is laid through several dwelling houses. This is the admitted effect of following the courses and distances of the return.

"The answer is that there is a mistake of 99 feet in one course, which makes the next course right through a row of houses and the suggestion is that this error be corrected by the map which shows a line running to one side of instead of through the dwellings.

"Where, however, the prosecutor is injured by an unlawful return it is no answer to say that the map does him no injury. This proceeding brings up primarily the return, and if it, on its face, discloses illegality, such that the road should not be left to depend upon it, the proceeding is absolutely defective.

"Even if the maps are referred to, but not made a part of the petition, they are not sufficient to aid a defective description." Detroit S. & D. Ry. Co. vs. Gartner, 95 Mich. 318, 54 N. W. 946.

DESCRIPTION — CAUSE No. 6430

This Description is open to the same objection as the other in that it requires a reference to some map or survey to determine whether the N. E. cor. of the SW¼ of the SW¼ of Sec. 3, is in the center of the proposed roadway or not. This being not an established Gov't Cor. but a 1/16 corner it not marked on the ground, and unless surveyed, may or may not coincide with the road survey. All, or most all, sections of land in mountainous country, such as this, vary in size, from a few feet to as many as forty feet. In as much, however, as the survey as published in the notice, and this is the jurisdictional part of the controversy, attempts to establish this beginning

point by courses and distance, which are admittedly in error, they have or can have no better rights than their notice affords.

Toledo Etc. Ry. Co. vs. Munson, 57 Mich. 42, 23 N. W. 455.

"A judgment for the condemnation of land for the use of a turnpike company should, undoubtedly, describe the land condemned so that it may be assertained and identified without extrinsic evidence."

Rising Sun Etc. Turnpike Co. vs. Hamilton, 50 Ind. 580;

Mathias vs. Drain Com'r., 49 Mich. 465, 13 N. W. 818;

Nat. Docks Etc. Connecting R. Co. vs. United Jersey Ry. Co., 52 N. J. Eq. 366, 28 A. 673.

20 C. J. 935, 936.

". . . Where the notice refers to and describes another instrument containing a description of the property, the latter becomes a part of the notice, but a reference to a map on file in some public office has been held insufficient."

In re Central Park Commrs., 51 Barb. (N. Y.) 277.

Nichols on Eminent Domain, p. 1054.

"Under Remington Code 1915, 921, providing that petition for condemnation shall describe the lands with reasonable certainty, it should describe them with all the certainty possible to determine the land condemned, and to enable the jury to know how much is to be paid for."

Wash. State vs. King Co. Superior Court, 102 Wash. 331, 173 pac. 186.

"The land taken for the use of the railroad must be so described either in the petition or report that its identity cannot be questioned — and where the proceedings are defective in this respect they will be reversed."

Pa. R. R. Co. vs. Porter & Porter, 29. Pa. 165.

"In condemnation proceedings by a railroad company the lands sought to be condemned must be within the located route of the condemning company and must be described with certainty so that they shall be capable of definite and unmistakable ascertainment. Uncertainty in this respect will vitiate the proceedings."

National Docks & N. J. Ry. Co. vs. State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

II.

We contend that the petition and notice are fatally defective and insufficient to confer jurisdiction upon the Court, over the objection and special appearances of appellants, and cannot be aided or cured by the surveyor's maps subsequently offered in evidence.

The Court cannot consistently refuse to consider the evidence on the part of appellants, because not brought up by bill of exceptions, and on the other hand aid the defective descriptions of appellee by reference to the maps offered in evidence.

In addition to the lack of jurisdiction obtained over appellants or their lands, it is submitted that the lands proposed to be condemned have not been so condemned because the descriptions were not amended during the progress of the trial. The erroneous descriptions were maintained through the proceedings of the trials, including the Findings of the Court, the Judgments on Verdict and the Decrees of Appropriation. It cannot therefore be pretended that the description appearing on a map offered in evidence, and not appearing in the judgments and degrees, could bind appellants or their lands. Nichols on Eminent Domain, p. 1073.

In the case of the land described in Cause No. 6429 the error is all the more flagrant because the party to whom this property had been conveyed by appellant, Margaret Rosborough (Wick having no interest whatever therein), was not a party to the proceedings and did not appear therein, and therefore no jurisdiction can be pretended to have been acquired over this owner nor her lands by reason of a notice published prior to her acquisition of title which notice had failed to describe the land proposed to be condemned and which it is claimed was designated in a map offered in evidence and not a part of the published notice.

The maps or surveyor's plats are no part of

either the petition or notice, and are not made a part thereof by reference. The published notice upon which jurisdiction, if acquired at all, is based, does not refer to the maps or plats, and contain the erroneous descriptions. Trans. pp. 24 to 30.

If it was proper for the Court to consider the maps, it was proper for it to consider the commissioners' proceedings and the improper certification of the same, because not only were the commissioners' proceedings an exhibit in the trials on use and necessity just as the maps were, but the proceedings of the commissioners were a part of the record, being an essential part of the preliminary steps prior to condemnation, and upon which the validity of the condemnation proceedings must of necessity depend.

It is absolutely essential that the property described in the notice should not only be so described that a layman could locate it without the necessity of resorting to highly technical mathematical formula or hypothesis, but also that the property to be taken would appear from the published notice itself and not by reference to some other source of information.

Where a description is wrong it is the same as service on the wrong person. In such a case, in

order to bring the land proposed to be condemned within the jurisdiction of the Court it is necessary that the notice be republished with the correct description, excepting where the owner has appeared generally, in which case petitioner might ask leave of the Court, before trial, to amend its petition. In the present cases, not only was there no general appearance and no leave to amend, and no judgment and decree covering the land desired to be appropriated, but appellants' motions to make more definite and certain and for bills of particulars were denied by the Court. (Tr. p. 45).

Even in a case where jurisdiction has been acquired over the persons of the property owners by a general appearance, a petitioner having opposed motions, timely made, to make more definite and certain and for bills of particulars, would be estopped from asking for leave to amend, subsequent to the trials.

This being a proceeding in rem, and not in personam, no greater or better right can be obtained than the notice affords.

The Court, having no jurisdiction of the owner, it is the land that is proceeded against and not the individual, and if the wrong land is described, then

it is the same as if the wrong individual had been served.

The owner is not required to look beyond the published notice to see if her property is affected, or employ a technical surveyor to untangle an erroneous description by making complete maps and trying to correct and reconstruct the description contained in the published notices on the basis of these plats and various highly technical hypothesis and engineering formulas. This is especially true of the shortness of the notice to non-residents required by the statutes of the State of Washington.

The fatal weakness of the argument regarding the map is that even after these maps had been introduced in evidence the findings of the trial Court, the judgments in condemnation and the decrees of appropriation all describe the land just as it had been wrongly described in the notice of condemnation and the petitions.

Even had the maps been expressly referred to in the published notices, they would have been unavailing to give the Court the necessary jurisdiction, in view of the fact that the maps were not published, and in addition, the judgments and decrees described the land not as shown by the maps,

but as it was wrongly described in the notices and petitions.

In other words, proceedings in condemnation are in derogation of the common law, and are to be strictly construed and as stated in the case of Dally vs. Missouri Pacific Railway Co., 170 N. W. 888, 103 Neb. 219, inaccurate statements in the petition materially affecting the dimension of the land affected, will render condemnation proceedings void that are held thereunder. In the Elizabeth Rau case, 70 N. Y. 191, only an inch or two was sufficient to vitiate the description, and they held extreme accuracy was essential in condemnation proceedings.

20 C. J. 905. 20 C. J. 724.

Jacobson vs. Superiior Court, Sonoma County (Cal.), 219 Pac. 986, 29 A. L. R. 1399.

Connecticut vs. McCook, 109 Conn, 147 Atl. 126.

Pontiac Improvement Co. vs. Cleveland (Ohio), 135 N. E. 636, 23 A. L. R. 866.

Cooley's Constitutional Limitations, 8 Ed. Vol. 2, p. 1120.

III.

There is this difference between the cases at bar, and the Wick vs. Chelan Electric Company, 280

U. S. 108, in that there was only a special appearance in the cases at bar and in the Chelan Electric Company case, they participated in the trials, both on use and necessity and on damages, and which no doubt was a controlling factor in the latter case.

More than this, it is submitted that apparently the following points were overlooked by appellant in the Wick case (Supra):

The statute requires publication once a week for two successive weeks in "any" newspaper published in the county. This statute is unconstitutional because it cannot be construed as requiring 14 days to elapse between the first and second publications.

It would be impossible to advertise even in a newspaper of daily circulation once a week for two successive weeks and give 14 days' notice, because 14 days could not elapse between the first and second publications, even if the first publication were on a Sunday.

The statute therefore must be construed as meaning that any publication once a week for two successive weeks would be a compliance therewith. Accordingly, publication on a Saturday of one week and Monday of the next week would be compliance with the statute. Therefore, the minimum amount of published notice petitioner could be re-

quired to give under the statute would be 3 days. For instance, Saturday of one week and Monday of the succeeding week, assuming that a Sunday publication would be improper.

In the case of a paper published weekly, and "any" newspaper would include a weekly paper, only 7 days could elapse between the first and second publications.

In addition, the Supreme Court of Washington has decided that the first publication amounted to service and that the 10 days required to be given resident owners had no application to non-residents.

Thus the amount of notice following the first publication would be dependent entirely upon what the Court considered reasonable and would necessarily vary in each case.

There is here an obvious discrimination against non-residents, and to that extent there is a further violation of Amendment Article Fourteen and of Sec. 2 of ART. IV of the Constitution of the United States.

Although a non-resident would require more time especially if he desired to remove to a Federal Court, he is discriminated against, being allowed no

definite time whatever under the statute in which to appear and defend.

Actual notice will not cure defect in statute.

> James vs. West Puerto de Luna Community Ditch, 23 N. M. 495, 169 Pac. 309;
>
> "It is not what is done under a statute in a given case, but it is what may be done, that determines its constitutionality."
>
> Lacey vs. Lemmons, 22 N. M. 54, 159 Pac. 949, 951.

This discrimination is the more apparent when the vast area of Chelan County is taken into consideration and the fact that the notice may be published in any newspaper in the county, and that in cases of intended removal to a Federal Court, three to ten days' notice of application for such removal is required to be given opposing counsel, under the laws of the State of Washington.

Regarding the shortness of the notices of appellants of trials, it is submitted that had appellants asked for continuance they might have jeopardized their special appearances. Numerous cases are to the effect that application for a continuance by one specially appearing, waives the special appearance.

> Bankers Life Assoc. vs. Shelton, 84 Mo. App. 634.

Marye vs. Strouse, 5 Fed. 494.

IV.

We respectfully call the Court's attention to the fact that no mention is made by the Court in its opinion on a number of the points raised by appellant in the Brief and more in particular to the following points:

(a) That no jurisdiction is shown over appellant Alice Barbee Wick, no land belonging to her being described in the Notice and Petition or in the Findings, Judgments or Decrees, or in any other portion of the proceedings.

(b) That there was no segregation or separate statement of damages as to the various defendants or their lands, in spite of the fact that no two of them were jointly interested in any of the lands described.

(c) That there was a taking or pretended taking of the fee where an assessment only was sufficient.

(d) That there was a failure to make any offer of settlement before bringing the condemnation proceedings.

(e) That the commissioner's proceedings were insufficient to support the connation proceedings.

COOLEY'S CONSTITUTIONAL LIMITATIONS

8th Ed. Vol. 2. p. 1193:

"As a general rule, the laws for the exercise of the right of eminent domain do not assume to go further than to appropriate the use, and the title in fee still remains in the original owner. In the common highways, the public have a perpetual easement, but the soil is the property of the adjacent owner, and he may make any use of it which does not interfere with the public right of passage, and the public can use it only for the purposes usual with such ways. And when the land ceases to be used by the public as a way, the owner will again become restored to his complete and exclusive possession, and the fee will cease to be encumbered with the easement.

Failure to negotiate and agree on settlement before starting condemnation.

Toledo Etcc. Ry. Co. vs. Detroit Ry. Co., 62 Mich. 564, 29 N. W. 500;

20 C. J. 893

"In most jurisdictions by express provision either in the constitution or by statute, and in some cases by both, proceedings to condemn property cannot be instituted unless such an attempt has been made.

"Such a provision is mandatory and not merely directory, and the condemnation proceedings are absolutely void in case no at-

tempt is made before beginning them, to come to an agreement with the owner.

"The attempt and failure to agree must be alleged, and proved, and this must appear on the face of the record.

"In order to satify the statutory requirement here must be a bona fide attempt to agree. There must be an offer made honestly and in good faith, and a reasonable effort to induce the owner to accept it."

Easement and not a fee granted by condemnation, Newton vs. Mfg. Ry. Co., 115 Fed. 781, 55 C. C. A. 599.

Where petitioner is authorized to condemn an easement only, the instrument is bad if it seeks to appropriate the fee.

Great Western Natural Gas Co. vs. Hawkins, 30 Ind. A. 557, 66 N. E. 765.

We respectfully submit that appellants are not seeking redress upon merely technical grounds, but because their substantial property rights as citizens of another state are being invaded by appellee, and the Court should be zealous to uphold those rights.

Boyd vs. United States, 116 U. S. 616.

We suggest to the Court that any citation against our position would not be in point unless the case involved a non-resident served only by publication, and specially appearing, and not participating in the trials, and no amendment of the description had

before judgment, and description in judgment and decree different from same in published notice as explained by a map filed in evidence.

We earnestly submit that the appellants are entitled to a rehearing in these cases.

Respectfully submitted,
BERKEY & COWAN,
Attorneys for Appellants.

I, the undersigned, one of the attorneys for appellants, do hereby certify that in my judgment the above and foregoing petition for rehearing is well founded and that the same is not interposed for delay.

CHAS. F. COWAN.

STATE OF WASHINGTON, }
County of SPOKANE } ss.

Chas. F. Cowan, being first duly sworn, deposes and says: I am one of the attorneys of record for appellants and the petitioners for rehearing in the above entitled cases now pending in the Circuit Court of Appeals for the 9th Circuit. That I served true and duly certified copies of said petition for rehearing in said cases upon J. A. Adams and Sam M. Driver, attorneys of record in said appeals for appellee, by depositing in the United States post-office at Spokane, Washington, on the 21st day of November, 1931, three copies of said petition addressed to J. A. Adams and Sam M. Driver, attorneys for Chelan County, Washington, Commercial Bank Building, Wenatchee, Washington, with postage fully prepaid thereon. That there is a regular mail communication between Spokane and Wenatchee, Washington.

CHAS. F. COWAN.

Subscribed and sworn to before me this 21st day of November, 1931.

JAMES A. LYBECKER.

Notarial Seal.
Commission expires
May 16,1933.

Notary Public in and for the State of Washington, residing at Spokane.

No. 6436

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JENNIE BLACKBURN, as Administratrix of the Estate of JOHN BLACKBURN,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

The Filmer Bros. Electrotype Co., San Francisco—4—23—31—60

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. ANTHONY SAVAGE and CAMERON SHERWOOD, Attorneys for Appellant,
310 Federal Building, Seattle, Washington.

GRAHAM K. BETTS, Esquire, Attorney for Appellee,
1402 Smith Tower, Seattle, Washington.

(Title of Court and Cause.)

COMPLAINT.

The plaintiff complains of the defendant and for cause of action alleges:

I.

That the plaintiff is the duly qualified and acting administratrix *ad prosequenden* of the estate of John R. Blackburn, deceased, and is a resident of Bothell, Washington.

II.

That said Jo*nr* R. Blackburn, deceased, enlisted for Military Services in the United States Army on the 30th day of March, 1917, and was honorably discharged from said service on the 25th day of September, 1919.

III.

That in or about the month of October, 1917, desiring to be insured against the risks of war, deceased applied for a policy of war risk insurance

in the sum of $10,000.00, and thereafter there was deducted from his monthly pay the sum of $6.40 as premium for said insurance, and the plaintiff has been informed and believes that a policy of war risk insurance was duly issued to said deceased by the terms whereof the defendant agreed to pay deceased the sum of $57.50 per month in the event he suffered total and permanent disability as result of said service to such an extent that it would be impossible for him to follow continuously a substantially gainful occupation but that said policy was never delivered to the plaintiff.

IV.

That on the 5th day of October, 1918, the deceased was gassed as a result whereof he became afflicted with stomach disorder, intestinal trouble and pulmonary tuberculosis, by reason whereof, he was discharged as aforesaid, totally and permanently disabled from following continuously any substantially gainful occupation, and as a proximate result thereof he died on the 10th day of December, 1925.

V.

That by reason of the foregoing, John R. Blackburn, deceased, became entitled to receive from the defendant the sum of $57.50 per month commencing on said date of discharge and continuing until the date of his death. That the plaintiff has made due proof of the foregoing to the defendant, and has demanded payment of the aforesaid amounts, but that the defendant has disagreed with the plain-

tiff and has refused and still refuses, to pay the same or any part thereof.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of $4,312.50, together with her costs and disbursements herein.

BEARDSLEE & BASSETT,
Attorneys for Plaintiff. [1*]

State of Washington,
County of King,—ss.

Jennie Blackburn, being first duly sworn on oath, deposes and says: That she is the plaintiff in the above-entitled action and as such makes this verification; that she has read the foregoing complaint, knows the contents thereof and believes the same to be true.

JENNIE D. BLACKBURN.

Subscribed and sworn to before me this 4 day of January, 1928.

[Seal] SAMUEL B. BASSETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Feb. 2, 1928. [2]

(Title of Court and Cause.)

ANSWER.

Comes now the defendant herein, by its attorneys, Anthony Savage, United States Attorney for the

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*Page-number appearing at the foot of page of original certified Transcript of Record.

Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

For answer to Paragraph I of plaintiff's complaint, defendant denies sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations therein contained, and therefore denies the same.

II.

For answer to Paragraph II of plaintiff's complaint, defendant admits that John R. Blackburn enlisted in the military service of the United States on March 30, 1917, but denies each, every and singular the other allegations therein contained.

III.

For answer to Paragraph III of plaintiff's complaint, defendant admits that on November 16, 1917, John R. Blackburn made application for and was granted war risk insurance in the amount of $10,000, payable in instalments of $57.50 per month in the event of death or permanent total disability occurring while said insurance was in force, but denies each, every and singular the other allegations therein contained.

IV.

For answer to Paragraph IV of plaintiff's com-

plaint, the defendant denies each, every and singular the allegations therein contained.

V.

For answer to Paragraph V of plaintiff's complaint, defendant admits that a disagreement exists between the defendant and the plaintiff herein, and that the defendant has refused and still refuses to pay the claim, but denies each, every and singular the other allegations therein contained.

For further answer and by way of a first and affirmative defense, the defendant does allege as follows:

I.

That John R. Blackburn enlisted in the military service of the United States on March 30, 1917, and was discharged therefrom on September 27, 1919; that on November 16, 1917, plaintiff applied for and was granted war risk insurance in the amount of $10,000, designating his brother, Russell Earl Blackburn, as beneficiary thereof; that this insurance lapsed for nonpayment of the premium due October 1, 1919, and was not in force and effect thereafter; that the permanent total disability of the plaintiff, if any, occurred after the date mentioned herein of the lapsation of said war risk insurance policy. [3]

WHEREFORE, having fully answered, defendant prays that the complaint of the plaintiff herein be dismissed with prejudice and that the defendant

may go hence with its costs and disbursements herein to be taxed according to law.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Attorney, United States Veterans' Bureau.

United States of America,
Western District of Washington,
Northern Division.

Tom DeWolfe, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this verification for and on behalf of the United States of America;

That he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

TOM DeWOLFE.

Subscribed and sworn to before me this 8th day of August, 1928.

[Seal] S. M. H. COOK,
Deputy Clerk, United States District Court, Western District of Washington.

[Endorsed]: Filed Aug. 9, 1928.

Received copy of the within answer.

_____,
Attorneys for Plaintiff.

August 9, 1928.

BEARDSLEE & BASSETT. [4]

(Title of Court and Cause.)

REPLY.

Comes now the plaintiff above named and for reply to defendant's first affirmative defense denies each and every allegation therein contained, except that plaintiff admits the policy of war risk insurance designated John R. Blackburn's brother, Russell Earl Blackburn, as beneficiary thereof.

W. G. BEARDSLEE,
Attorney for Plaintiff.

State of Washington,
County of King,—ss.

Jennie Blackburn, being first duly sworn on oath, deposes and says: That she is the plaintiff named in the above-entitled action; that she has read the foregoing reply, knows the contents thereof and believes the same to be true.

JENNIE BLACKBURN.

Subscribed and sworn to before me this 27 day of August, 1928.

[Seal] LOUIS T. SILVAIN,
Notary Public in and for the State of Washington, Residing at Seattle.

Received copy of within reply this 28th day of August, 1928.

TOM DeWOLFE,
Attorney for Defendant.

[Endorsed]: Filed Aug. 28, 1928. [5]

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and fix the date of the beginning of his total and permanent disability from September 25, 1919.

ED. GRINWALD,
Foreman.

[Endorsed]: Filed Dec. 9, 1930. [6]

United States District Court, Western District of Washington, Northern Division.

No. 12,185.

JENNIE BLACKBURN, as Administratrix of the Estate of JOHN R. BLACKBURN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT.

The above-entitled cause having come duly on for trial the 9th day of December, 1930, before the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court, the plaintiff appearing in person and by her attorneys, Graham K. Betts and W. G. Beardslee, of counsel, the defendant, United

States of America appearing by Cameron Sherwood, Assistant United States District Attorney, and E. I. Burns, Special Counsel for the United States Veterans' Bureau, a jury having been duly empanelled and sworn to try said cause, and after having duly considered the evidence produced by both parties, and having, on the said 9th day of December, 1930, returned a verdict in favor of the plaintiff to the effect that John R. Blackburn became totally and permanently disabled on the 25th day of September, 1919, and in consequence thereof the plaintiff became entitled to receive from the defendant the sum of $57.50 per month, commencing on the 25th day of September, 1919.

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover from the defendant the sum of $4,312.50, that being the amount due the estate on the $10,000.00 Policy War Risk Insurance herein issued upon, at the rate of $57.50 per month, commencing on the said 25th day of September, 1918, and continuing to and including the 25th day of November, 1925, said latter date being the last anniversary of a payment due hereunder prior to the death of the insured, said payments to be made as by law in such cases provided.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Graham K. Betts is entitled to receive from said judgment as a reasonable attorney fee for his services in the above-entitled cause, the sum of $431.25, that being 10% of the said [7] $4,312.50 due the plaintiff herein, and

that he, his heirs, executors or assigns, is entitled to receive the further sum of 10% of each and every other payment hereinafter made by the defendant to the heirs, executors, assigns or beneficiaries of the decedent, John R. Blackburn on the said policy of insurance as a result of, or in consequence of, the entrance of this judgment, said payments to be made as by law in such cases provided.

To all of which the defendant eccepts and its exception is hereby allowed.

Done in open court this 11 day of December, 1930.

JEREMIAH NETERER,
Judge.

O. K. as to form.

CAMERON SHERWOOD,
Asst. U. S. Atty.
EDWARD I. BURNS.

[Endorsed]: Filed Dec. 11, 1930. [8]

(Title of Court and Cause.)

STIPULATION FIXING TIME TO AND INCLUDING FEBRUARY 1, 1931, TO LODGE PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED between the parties to the above-entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 1st day of February, 1931, in which to lodge its proposed bill of exceptions herein.

Dated at Seattle, Washington, this 12th day of December, 1930.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
W. G. BEARDSLEE,
GRAHAM K. BETTS,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 12, 1930. [9]

(Title of Court and Cause.)

ORDER FIXING TIME TO AND INCLUDING FEBRUARY 1, 1931, TO LODGE PROPOSED BILL OF EXCEPTIONS.

Upon application of the defendant herein, and pursuant to stipulation of both parties,—

IT IS HEREBY ORDERED that defendant herein may have up to and including the 1st day of Feb. 1931, in which to lodge its proposed bill of exceptions herein.

Done in open court this 12 day of December, 1930.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form.

GRAHAM K. BETTS,
Atty. for Pltf.

[Endorsed]: Filed Dec. 12, 1930. [10]

(Title of Court and Cause.)

MOTION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, and Cameron Sherwood, Assistant United States Attorney for said District, and E. I. Burns, Special Counsel for the United States Veterans' Bureau, and petitions the above court for an order granting a new trial in the above-entitled cause, for the following reasons, to wit:

(1) Error in law occurring at the trial and duly excepted to by the defendant.

(2) Insufficiency of the evidence to justify the verdict.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.

Received a copy of the within motion this 16 day of Dec., 1930.

GRAHAM K. BETTS,
Attorney for Pltf.

[Endorsed]: Filed Dec. 16, 1930. [11]

(Title of Court and Cause.)

ORDER DENYING MOTION FOR NEW TRIAL.

This matter having come before the above-entitled court on the motion of the defendant herein for a new trial, and both parties having submitted said motion to the court for ruling thereon, without argument, and the court being duly advised in the premises,—

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the defendant's motion for a new trial herein be, and the same hereby is, denied, and an exception is noted on behalf of the defendant.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form.

GRAHAM K. BETTS,
Attorney for Plaintiff.

Received a copy of the within order this 16 day of Dec., 1930.

GRAHAM K. BETTS,
Attorney for Pltf.

[Endorsed]: Filed Dec. 22, 1930. [12]

(Title of Court and Cause.)

STIPULATION FIXING TIME TO AND INCLUDING MARCH 10, 1931, TO LODGE AND SETTLE PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED between the parties to the above-entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 10th day of March, 1931, in which to lodge and have settled its proposed bill of exceptions herein.

Dated at Seattle, Washington, this —— day of February, 1931.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
GRAHAM K. BETTS,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 2, 1931. [13]

(Title of Court and Cause.)

ORDER FIXING TIME TO AND INCLUDING MARCH 1, 1931, TO LODGE AND SETTLE PROPOSED BILL OF EXCEPTIONS.

Upon application of the defendant herein, and pursuant to stipulation of both parties,—

IT IS HEREBY ORDERED that defendant herein may have up to and including the 1st day of March, 1931, in which to lodge its proposed bill of exceptions herein, and have same settled.

Done in open court this 2d day of February, 1931.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Feb. 2, 1931. [14]

STIPULATION FIXING TIME TO AND INCLUDING MARCH 20, 1931, TO LODGE AND SETTLE PROPOSED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED between the parties to the above-entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 20 day of March, 1931, in which to lodge and settle its proposed bill of exceptions herein.

Dated at Seattle, Washington, this 5 day of March, 1931.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Asst. United States Attorney.
GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 5, 1931. [15]

ORDER FIXING TIME TO AND INCLUDING MARCH 20, 1931, TO LODGE AND SETTLE PROPOSED BILL OF EXCEPTIONS.

Upon application of the defendant herein, and pursuant to stipulation of both parties,—

IT IS HEREBY ORDERED that defendant herein may have up to and including the 20 day of Mar. 1931, in which to lodge and have settled its proposed bill of exceptions herein.

Done in open court this 5 day of March, 1931.

NETERER,
United States District Judge.

Received copy of within order this 5th day of March, 1931.

GRAHAM K. BETTS.

[Endorsed]: Filed Mar. 5, 1931. [16]

(Title of Court and Cause.)

NOTICE OF APPEAL.

To Jennie Blackburn, Plaintiff, and W. G. Beardslee and Graham K. Betts, Attorneys for Plaintiff:

YOU AND EACH OF YOU will please take notice that the United States of America, defendant in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order

entered in the above-entitled cause on the 11th day of December, 1930, and that the certified transcript of record will be filed in the said Appellate Court within thirty days from the filing of this notice.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within notice of appeal this 5 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931. [17]

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above-named defendant, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on the 11th day of December, 1930, does hereby appeal from the said order, judgment and decree in each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said

order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said court in such cases made and provided.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney,
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within petition for appeal this 5 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931. [18]

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR.

Comes now the United States of America, defendant in the above-entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Cameron Sherwood, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney, United States Veterans' Bureau, Seattle, and in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it at the time of said trial

herein, and upon which it relies to reverse the judgment herein.

I.

The Court erred in denying the defendant's motion for a directed verdict, which motion was made at the close of the plaintiff's case, for the reason that the plaintiff did not prove permanent, total disability of John R. Blackburn during the time his policy was in effect and to which denial defendant took exception at the time of the interposition of said motion herein.

II.

The District Court erred in denying defendant's petition for a new trial, which denial was excepted to by the [19] defendant at the time of the interposition of said motion herein.

III.

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment.

IV.

The District Court erred in denying defendant's motion for a direct verdict at the close of the entire testimony, which motion was interposed on the ground that John R. Blackburn had not been proven to have been permanently and totally disabled from following a gainful occupation in a substantially continuous manner during the time his policy was in effect.

V.

That the Court erred in denying defendant's mo-

tion for a nonsuit at the close of the plaintiff's evidence, and renewed at the close of the entire case.

VI.

That the Court erred in admitting in evidence Plaintiff's Exhibits 1, 2 and 3, over objection of defendant, in that the admission of these exhibits deprived defendant of the right of cross-examination, and on the ground that they were self-serving declarations of plaintiff.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Asst. United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within assignments of error this 5 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931. [20]

[Endorsed]: Lodged Mar. 10, 1931.

Received copy of the within bill of exceptions this 9th day of March, 1931.

GRAHAM K. BETTS,
Atty. for Plff.

(Title of Court and Cause.)

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore and on, to wit, the 9th day of December, 1930, at the hour of ten o'clock A. M., the above-entitled cause came regularly on for trial in the above-entitled court before the Honorable Jeremiah Neterer, one of the Judges of said court, sitting with a jury, in the north courtroom of the Federal Building, at Seattle, Washington, the plaintiff appearing by his counsel, Graham K. Betts, the defendant appearing by its counsel, Cameron Sherwood, Assistant United States Attorney at Seattle, Washington, and Erwin I. Burns, Special Counsel, United States Veterans' Bureau, Washington, D. C.

WHEREUPON, the jury being duly empaneled and sworn to try the cause, the following proceedings were had and testimony taken, to wit:

TESTIMONY OF FRANK RENCHEY, FOR PLAINTIFF.

FRANK RENCHEY, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination.

My name is Frank Renchey, and I reside in Bothell. I knew Johnny Blackburn ever since his birth. He was in the neighborhood of six feet, I think,

(Testimony of Frank Renchey.)

when he went to the war, [21] not extremely heavy, but a good, rugged boy. I saw him shortly after he came back from service. I noticed that he had a slight cough all the time, and that his complexion was sallow, very yellow. I noticed that he was not as fleshy as before. I saw him up until the time he went to California before his death.

I worked with him at Mr. Wilson's mill packing shingles. Johnny was packing shingles, too. I do not know when he went to the hospital. I worked with him before he went to the hospital. He would get sick at his stomach while standing there packing. I worked with him another time. Sometimes he was sick at his stomach several times a day. I have seen him against the buckboard several times and he would have to leave and go outside suffering a vomiting attack. Sometimes he would be gone fifteen or twenty minutes after a spell. I don't think he worked regularly. I know he did not work a great deal.

Cross-examination by Mr. BURNS.

I was employed at Wilson's mill with Johnny Blackburn. I could not say how long we were employed there. I do not even know the year.

I saw Johnny Blackburn shortly after his discharge. When he came back to Bothell. I noticed that he coughed shortly after his return, possibly three or four months after his return, around town. I worked at the mill for quite a few years. It might have been closed down while Blackburn

(Testimony of Frank Renchey.)

was there. I thought Blackburn to be a good healthy lad before he went to service. I noticed his complexion was sallow when I first went with him to a dance. I do not know the date. [22]

Redirect Examination by Mr. BETTS.

I sure was a friend of Johnny Blackburn. I saw him when he came back from the army. He was in Bothell when I saw him.

Mr. SHERWOOD.—I move to strike the testimony of the witness on the ground that it is too indefinite.

The COURT.—Denied.

Mr. SHERWOOD.—Exception.

TESTIMONY OF R. C. POLLEY, FOR PLAINTIFF.

R. C. POLLEY, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is R. C. Polley. I have lived at Bothell, Washington, for twenty years. I knew Johnny Blackburn over twenty years. I saw him soon after he came back from the war, the first week after his return.

I am foreman for King County Road Construction.

I should judge he weighed about 165 to 170 when he went in the army, and that he weighed 145 when

(Testimony of R. C. Polley.)

he returned. He had a hacking cough which continued. He would have spells of coughing and would have to sit down or lie down or something. He worked under my supervision for the county in April, 1921, April, May, June and July, I think. He was raking pea gravel. That is not hard work. He did not work steady. There was one month he worked pretty steady and then the next if I remember, he did not work so very much; a few days each month. He worked all day some days. I would have to send him home when he would have a sick spell. He would vomit if he would lift anything at all times of the day. He would go three or four days, be pretty good, and the next three or four days, he wouldn't be so good. [23]

Cross-examination by Mr. BURNS.

I do not recall the year John Blackburn was discharged. I do not know that Blackburn weighed 139 or 165 pounds when he went in the service. I don't know what he weighed when he came back.

(Testimony stricken with respect to the weight of John Blackburn.)

I would not be sure, but I think John Blackburn worked for me April, May, June and July, 1921. He worked all month in April, I think. He did not work two continuous months. He might have gone to work in March for the county. I think he worked a little over two months out of the four, but I do not know how regularly he worked in March, April, May,

(Testimony of R. C. Polley.)

June or July. He was raking pea gravel, labor. He did his work in a satisfactory manner while he was working. The same as any other man would do it. I think he was paid $4.00 a day.

TESTIMONY OF C. R. CHRISTIE, FOR PLAINTIFF.

C. R. CHRISTIE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is C. R. Christie, and I am employed by the United States Veterans' Bureau, and have charge of the records of the claimants. I have the records of the plaintiff. At the time a man enters the hospital he is given a diagnosis, and is given an examination before he goes to the hospital. I have an examination here but I can't identify it as being the one he was sent to the hospital on, made in July, 1921. I have no examination dated November 1, 1922. I have a rating of December, 1922, but it is not permanent and total. I have a record of his examination at Whipple Barracks, Arizona, January 15, 1924. These are regular records of the Bureau. [24]

Plaintiff's Exhibits 1, 2 and 3 offered.

Mr. BURNS.—I object, first, on the ground that the Government is deprived of its right of cross-examination and that the reports contained statements made by the man, himself, which are self-

(Testimony of Roy B. Misener.)

serving declarations. The plaintiff had every opportunity to call these doctors had he seen fit to do so and the Government would, then, have had an opportunity to cross-examine. By offering these examinations the Government is deprived of its right of cross-examination and we get into the record self-serving declarations.

The COURT.—Overruled.

Mr. BURNS.—Exception.

WITNESS.—I have report of first examination after Blackburn's discharge dated March 31, 1920.

Plaintiff's Exhibits 1, 2 and 3 admitted.

Mr. BURNS.—I offer report of first examination of insured.

Defendant's Exhibit "A–1" admitted in evidence.

TESTIMONY OF ROY B. MISENER, FOR PLAINTIFF.

ROY B. MISENER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Roy B. Misener. I used to live in Bothell. I knew Johnny Blackburn very well. I enlisted in the same company with Johnny and went overseas with him. I did not see him from Christmas, 1917, until the first part of May or June, 1918, on my way to the front. I met him for two hours on the train going to the front. I did not see him again until after we returned from the service.

(Testimony of Roy B. Misener.)

I believe Johnny returned shortly after March, 1919, during the summer.

I saw Blackburn in bed the first or second day he came back from France and went to see him on the porch of his home in Bothell. He appeared to be in a rundown condition. I saw him many times after that. I would see him every six weeks at his home. I met him on the street several times. I usually found him in bed most of the time. He was a very good friend of mine and I went to his home many, many times while he lay in bed, and sat and talked for half an hour or hour. [25]

Cross-examination by Mr. BURNS.

I do not know whether Blackburn was discharged in 1919 or 1920. I saw him immediately upon his return to Bothell as soon as he *was his* discharge from the army. I was not a particularly good friend of the family's. I was a good friend of Johnnie's. I never saw him do any work after his discharge. I understand that he worked at the Wilson mill a short time.

TESTIMONY OF JENNIE BLACKBURN, FOR PLAINTIFF.

JENNIE BLACKBURN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Jennie Blackburn, and I am the

(Testimony of Jennie Blackburn.)

mother of John Blackburn. I am the plaintiff in this action. My son was discharged in the fall of 1919. He lived with me after his discharge, coming right home. When he came home he had to go to the Veterans' Bureau for examination and to the Cushman Hospital. He spent his winters there and the summers at home. From Cushman he went to Walla Walla. From there to Phoenix, Arizona, where he spent the winters, and the last winter he came home in that condition. There was no help for him after that. I saw him try to work, packing shingles in the shingle-mill. He would not be able to eat when he came home at night. Sometimes he would eat and sometimes he would not. He would have a coughing spell and vomit and then go to bed. I think he went to work at Wilson's mill in the fall of 1919, the same fall he came home. He did not go to work immediately. He was at home a time before he went to work. He would sit around home and read and rest. He could not place himself. He did chores around the house, but it would tire him. After he did the chores he would get sick and tired. He was worn out. [26] This was before he went to work for Wilson's. I could not say how long he worked at Wilson's, but it was not very long. It was not long before he had to go to the hospital. He worked for the county off and on after he worked at Wilson's mill. He was at Cushman Hospital two winters and spent a winter in Walla Walla and the last winter he went to Arizona and was sent back with a nurse. I am the administratrix of his estate.

(Testimony of Jennie Blackburn.)

Plaintiff's Exhibit 4 admitted in evidence, being letters of administration.

Cross-examination by Mr. BURNS.

My son returned home in the fall of 1919. He went to work at Wilson's mill in the fall of 1919. He may have worked for Wilson's mill in January, February and March of 1920. Mr. Polley is my niece's husband.

TESTIMONY OF DR. ELMER E. LYTLE, FOR PLAINTIFF.

Dr. ELMER E. LYTLE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Dr. Elmer E. Lytle. I am a physician and surgeon, and I have practiced in the State of Washington for 40 years. I practiced at Bothell, Washington. I have treated John R. Blackburn. The last time was from May 1, 1925, until June 13, 1925. I also treated him when he was a child.

I found him between May 1, 1925, and July 13, 1925, suffering from an advanced stage of tuberculosis—by advanced stage I mean a later stage. I could not tell just the number of years he had been suffering with tuberculosis, but it has existed over a rather long period of time. He was totally and permanently disabled at the time I examined him. I believe that he began [27] to suffer with tuber-

(Testimony of Dr. Elmer E. Lytle.)

culosis between the time he was gassed until the time he was first examined on July 19, 1921. He was totally and permanently disabled if he was in the hospital.

Cross-examination by Mr. BURNS.

If he had active tuberculosis he should not follow any occupation. I should say he was totally and permanently disabled from following continuously any gainful occupation.

Q. How long did that continue prior to the 21st of July, 1921? How long has he been totally and permanently disabled prior to that time?

A. Judging by the subsequent—he was not able at any time.

Mr. SHERWOOD.—I object to that. The answer is not responsive.

The COURT.—Not taking into consideration what followed, what would you say at that time how long had he been totally and permanently disabled?

A. In my opinion, he should not work any time.

The COURT.—That don't answer it.

Q. How long had he been totally and permanently disabled?

A. Well, from the time he first developed—

Q. (Interrupting.) You said while ago, from the time he was gassed. How long would that be reasonably certain to continue in the future, from that diagnosis and what preceded?

A. Rest is one of the main requirements—

The COURT. — (Interrupting.) Answer the

(Testimony of Dr. Elmer E. Lytle.)

question, how long would it be reasonably certain to continue in the future?

A. If he needed rest, he should not work, that is all.

Mr. SHERWOOD.—I ask that the jury be instructed to disregard the answer.

The COURT.—How long would that condition be reasonably—the total and permanent condition—be reasonably certain to continue in the future? [28]

A. Of course, that depends on so many things.

The COURT.—You have everything before you. You have the hypothetical question before you—the conditions on down, his employment and relations and this diagnosis—you say from this diagnosis, he was permanently and totally disabled from the time of his discharge or from the time of being gassed—now, then, how long, based on the same hypothesis, would this total and permanent condition be reasonably certain to continue in the future, a year or two years or five years or life?

A. I know the results—

The COURT. — (Interrupting.) Not judging anything by the results.

A. Under the proper treatment—

The COURT. — (Interrupting.) Answer the question, if you want to tell us what you know; if you don't know, tell us and if you know, tell us.

A. Please ask the question again.

The COURT.—You said, from what they asked you and the testimony as to the condition of the deceased from his discharge and this diagnosis, that

(Testimony of Dr. Elmer E. Lytle.)

on the 25th day of July, 1921, that you considered he was totally and permanently disabled from the date he was gassed in the army. Now, then, from the same hypothetical question and upon the same diagnosis, how long would you say the total and permanent disability condition would continue in the future?

A. If I remember—

The COURT.—(Interrupting.) Can you tell us?

A. No.

Redirect Examination by Mr. BETTS.

Q. Doctor, I believe you testified he was totally and permanently disabled, was he, Doctor?

Mr. SHERWOOD.—On what date?

Mr. BETTS.—I think he said from the date he was gassed.

A. I said it probably developed between the time he was gassed until a diagnosis was first made.

Recross-examination by Mr. SHERWOOD.

I am not a specialist in tuberculosis. His mother gave me his medical history at the time of the examination. The tuberculosis was not arrested when I examined him in May, 1925. I did not examine him at any time from September, 1919, until July, 1925. I do not know his condition during the intervening time. He may or may not have been working during [29] that time. I was their family doctor. I don't recall that he called upon me between the time he returned from service and the

(Testimony of Dr. Elmer E. Lytle.)
time I examined him in 1925. I remember seeing him but did not examine him in a medical way.

Redirect Examination by Mr. BETTS.

He died the following December after I examined him.

Mr. BURNS.—At this time the Government moves for an involuntary nonsuit on the grounds that the evidence offered by the plaintiff fails to establish a *prima facie* case; that there is nothing in the evidence to show that this man was permanently and totally disabled at any time while his insurance contract was in force and effect. The evidence that has been offered to-day is practically the same as the evidence that was offered at the previous trial.

(Argument.)

Motion denied.

Mr. SHERWOOD.—Exception.

TESTIMONY OF C. E. WILSON, FOR DEFENDANT.

C. E. WILSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is C. E. Wilson, Bothell. I am running a cigar-store now. I ran a shingle-mill in 1919 and 1920. I knew John R. Blackburn. He worked for me, I believe, in 1920. He began to work for me in the spring of 1920. He might have begun to work

(Testimony of C. E. Wilson.)

for me on January 19, 1920. I [30] can't remember the exact dates. He worked a month or so as a shingle packer taking loose shingles and putting them into bunches. He did his work in a satisfactory manner so far as I remember. I don't remember whether he was regularly in attendance. The mill runs eight hours. He worked eight hours a day. I paid him the same wages as others engaged in the same line of work. He did his work as well as that performed by others doing the same work. I cannot state exactly. I don't remember why he quit.

Cross-examination by Mr. BETTS.

I knew him quite well. He complained that he did not feel well, while he was in my employ.

TESTIMONY OF DR. ARTHUR L. BARNES, FOR DEFENDANT.

Dr. ARTHUR L. BARNES, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is Arthur L. Barnes, Portland, Oregon, and I am a physician. I have been engaged in this particular profession for forty years.

I have examined John R. Blackburn, the first time being in August, 1920. His major disability at that time was tenderness over the abdomen due to adhesions, resulting from an old appendicitis.

(Testimony of Dr. Arthur L. Barnes.)

That is the only major disability, and perhaps a nasal disability. I did not find any evidence of a tubercular condition in August, 1920. I did not find anything abnormal as to the lungs. I would have noticed any extensive involvement of the lungs had it been present. I examined Mr. Blackburn in December, 1920, and his condition was the same as in August, 1920. His condition at that time was not disabling to such an extent as to prevent him from following continuously a gainful occupation. [31]

Cross-examination by Mr. BETTS.

I am testifying from my records and from a general recollection. I do not specialize in any particular disease. I referred him to an X-ray man at the time of the second examination. The adhesions were extensive enough to cause vomiting without any other involvement. He gave a complaint of stomach trouble. At one time he complained of a pain in the chest, stomach and bowels. I accepted Dr. Bates' recommendation after X-ray. Dr. Bates said it was due to adhesions. It is possible that pains in the stomach were caused by intestinal tuberculosis, but I don't know that this was true in this case. I did not make any such diagnosis. I did not find any evidence of any lung condition at all. An involvement of the intestines often occurs in tuberculosis cases. I suppose I gave him the usual chest examination of a general examiner, noting respiration and whether or not there was any dullness by percussion, that is, using the finger-tips,

(Testimony of Dr. Arthur L. Barnes.)
going over the chest wall, also by the use of a stethoscope, an instrument for listening to the sounds in the chest walls. I made several examinations a day at that time for the Public Health Service preceding formation of the Bureau.

TESTIMONY OF DR. KIRK BROWN, FOR DEFENDANT.

Dr. KIRK BROWN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is Kirk Brown, physician and surgeon. I have been engaged in this profession for thirteen years. I examined John Blackburn, according to my records, in March, 1920. I found that he was suffering at that time from a chronic inflammation of the eyelids and adhesions of the intestines. Those were the only disabilities that I found at that time. I found no evidence of a tubercular condition. I examined him for tuberculosis and found no manifestations of it. [32] I considered at that time that his condition was such that he could follow continuously a gainful occupation.

Cross-examination by Mr. BETTS.

I was working for the Public Health Service at the time I examined him. I made an examination of his chest. I am not a specialist of tuberculosis. I made no X-ray. I could not say conclusively that

(Testimony of Dr. Kirk Brown.)

he did not have tuberculosis. I found abdominal adhesions. These adhesions could have caused stomach trouble he complained of. He did not have intestinal tuberculosis at that time. Intestinal tuberculosis is very difficult to diagnose. Stomach trouble is quite frequently found in earlier stages of intestinal tuberculosis. It is true that being gassed would cause such a weakening of the system as to give room for tuberculosis infection to develop. He could have had tuberculosis without my finding it.

Redirect Examination by Mr. BURNS.

I don't believe that I would have passed up a gross tubercular lesion.

Recross-examination by Mr. BETTS.

Incipient tuberculosis is not totally disabling but it would put him in a condition where he should not work, whether he did or not.

TESTIMONY OF DR. A. C. FEAMAN, FOR DEFENDANT.

Dr. A. C. FEAMAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is Albert C. Feaman, Seattle, Washington. I am a physician and surgeon, confining my work to the diseases of the heart and lungs. I have specialized the past 11 years in diseases of the

(Testimony of Dr. A. C. Feaman.)

heart and lungs. I have examined many men who were subjected to gas while in the service. My observation has been that the percentage of the cases who have been [33] subjected to war gasses are no greater as a result of that experience, the percentage that developed tuberculosis. Men who have been subjected to war gasses, chlorine, mustard gasses, the damage is done at the time of the gassing and the various countries of Europe and American forces made a survey, because they thought that warfare gasses were responsible for the production of a greater number of tuberculosis cases but after a very careful survey of cases, who have been gassed, it is shown that percentages showed no greater amount of tuberculosis than men who had never seen or been touched in any way by warfare gasses. So, the conclusion was drawn, warfare gassing was not responsible for the production of tuberculosis. Tuberculosis of the intestinal tract is represented by reason of intestinal irritation or inflammation. Vomiting is not an indication of tuberculosis of the intestines. As a rule, tuberculosis of the intestinal tract is always fatal. The period between the contracting of intestinal tuberculosis and death varies from a few months to several years, but usually a short period of time. It does not seem plausible that a man who died in 1925 could have been affected with tuberculosis of the bowels in 1919.

Cross-examination by Mr. BETTS.

I have not examined John Blackburn. My observation has proven that a man who has been gassed

(Testimony of Dr. A. C. Feaman.)

is not in such a condition as to be more susceptible to tubercular infection than a man who has not been gassed. The lung of a man who has been gassed is no more liable to develop tuberculosis than that of anyone who has never been exposed to warfare gasses. The effect of gas is an immediate one. [34] It is true that a great many people have tuberculosis germs in their systems and do not know it is active. Every adult individual who has lived a city life has a primary infection. If a man is gassed it is hardly possible any man who has been gassed did not have some evidence of tuberculosis in his chest.

Mr. BURNS.—The Government rests.

Mr. BETTS.—No rebuttal.

Mr. BURNS.—At this time the Government desires to renew its motion for a directed verdict on the same grounds as originally stated.

The COURT.—The motion is denied.

Mr. BURNS.—Exception.

The COURT.—Noted.

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions, may be settled, allowed, signed, sealed by the Court and made a part of the record.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau. [35]

(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS.

The above case coming on for hearing on application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing; and it appearing to the Court that said bill of exceptions contains all of the material facts occurring upon the trial of the cause and all the evidence adduced at the same, together with exceptions thereto and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions; and the parties hereto having stipulated and agreed upon said bill; the Court being duly advised,

IT IS BY THE COURT ORDERED that said bill of exceptions be and it hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions therefor, occurring upon the trial of said cause and evidence adduced at same and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct bill of exceptions, [36] and the Clerk of the court is hereby ordered to file the same as a record of said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the Clerk of this court attach all of the exhibits in this cause to

said bill of exceptions, making the same a part hereof.

Dated this 30 day of March, 1931.

JEREMIAH NETERER,
United States District Judge.

O. K.

———————.

[Endorsed]: Filed Mar. 30, 1931.
G. O. B. 14, pg. 69. [37]

———

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

On the application of the defendant herein—

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 11th day of December, 1930, be, and the same is hereby allowed.

IT IS FURTHER ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 9 day of March, 1931.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within order this 5 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931. [38]

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the documents listed below.

Complaint.

Answer.

Reply.

Verdict.

Judgment.

Stipulation and order allowing defendant to February 1, 1931, to file bill of exceptions.

Motion for new trial.

Order denying motion for new trial.

Stipulation and order extending time to lodge bill of exceptions to March 1, 1931.

Stipulation and order extending time to lodge and settle bill of exceptions to March 20, 1931.

Notice of appeal.

Petition for appeal.

Assignments of error.

Order allowing appeal.

Citation on appeal.

Bill of exceptions.

Original exhibits both offered and admitted.

Copy of this praecipe.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.

Received a copy of the within praecipe this 11 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 12, 1931. [39]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the above-entitled court, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 41, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause (except captions, etc., where omitted) as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees

and charges incurred in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, to wit:

Clerk's fees (Act Feb. 11, 1925) for making certificate, record or return 100 folios, at 15¢	$15.00
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
Total	$21.00

[40]

I hereby certify that the above cost for preparing and certifying record, amounting to $21.00, has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

I further certify that I hereto attach and herewith transmit the original citation issued in the cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, this 7th day of April, 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court, Western District of Washington.

By E. W. Pettit,
Deputy. [41]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States to Jennie Blackburn, as Administratrix of the Estate of John Blackburn, Plaintiff, and W. G. Beardslee and Graham K. Betts, Her Attorneys.

YOU, AND EACH OF YOU, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the City of San Francisco, California, in the Ninth Judicial Circuit, on the 10th day of April, 1931, pursuant to an order allowing appeal filed in the office of the Clerk of the above-entitled court, appealing from the final judgment signed and filed on the 11th day of December, 1930, wherein the United States of America is defendant, and Jennie Blackburn, as administratrix of the estate of John Blackburn, is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, Northern Division, this 9 day of March, 1931.

[Seal] JEREMIAH NETERER,
United States District Judge.

Received a copy of the within citation on appeal this 5 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 9, 1931.

[Endorsed]: No. 6436. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jennie Blackburn, as Administratrix of the Estate of John Blackburn, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 10, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6436

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JENNIE BLACKBURN, AS ADMINISTRATRIX OF THE ESTATE OF JOHN R. BLACKBURN, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
Special Counsel,
Veterans' Administration.
BAYLESS L. GUFFY,
Attorney,
Veterans' Administration.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6436

UNITED STATES OF AMERICA, APPELLANT

v.

JENNIE BLACKBURN, AS ADMINISTRATRIX OF THE Estate of John R. Blackburn, appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

STATEMENT OF THE CASE

This is the second appeal in this case, a former judgment for the plaintiff having been reversed by this honorable court in an opinion filed July 15, 1929. (33 Fed. (2d) 564.)

Plaintiff, appellee herein, instituted this action to recover on a contract of War Risk Term Insurance granted one John R. Blackburn by the defendant while in its military service during the World War.

In her petition (R. 1–3) plaintiff, after alleging the enlistment and discharge of the insured, and

the granting of the contract sued on, alleges in Paragraph IV (R. 2) that on October 5, 1918, while in defendant's service, the insured was gassed, as a result of which he became afflicted with stomach disorder, intestinal trouble, and pulmonary tuberculosis, by reason whereof he was totally and permanently disabled.

In Paragraph V of her petition plaintiff alleges that by reason of the foregoing the insured became entitled to receive from the Government the sum of $57.50 per month, commencing at the date of discharge and continuing until his death.

In its answer (R. 3–5) defendant, after admitting the enlistment, discharge, and granting of the contract sued on, denied that insured became permanently and totally disabled during the life of said contract, and as an affirmative defense defendant set up the lapse of the contract sued on by reason of nonpayment of premiums.

In her reply (R. 7) plaintiff denied defendant's affirmative defense.

This cause was tried to a jury. (R. 21.)

At the close of plaintiff's evidence (R. 33) the defendant moved the court for an involuntary nonsuit on the grounds that the evidence offered by the plaintiff failed to establish a prima facie case, which motion was by the court denied (R. 33).

At the close of the whole case (R. 39) the defendant moved for a directed verdict on the grounds stated in support of the motion for an involun-

tary nonsuit, which motion was by the court denied (R. 39).

Whereupon the cause was submitted to a jury, which returned its verdict for plaintiff. (R. 8.) Judgment was rendered on the verdict in behalf of plaintiff. (R. 8–10.) Defendant filed its motion for a new trial (R. 12) which motion was by the court overruled (R. 13). From the judgment in favor of plaintiff defendant has appealed. (R. 41.)

ASSIGNMENTS OF ERROR

I

The Court erred in denying the defendant's motion for a directed verdict, which motion was made at the close of the plaintiff's case, for the reason that the plaintiff did not prove permanent, total disability of John R. Blackburn during the time his policy was in effect and to which denial defendant took exception at the time of the interposition of said motion herein.

II

The District Court erred in denying defendant's petition for a new trial, which denial was excepted to by the defendant at the time of the interposition of said motion herein.

III

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment.

IV

The District Court erred in denying defendant's motion for a directed verdict at the close of the entire testimony, which motion was interposed on the ground that John R. Blackburn had not been proven to have been permanently and totally disabled from following a gainful occupation in a substantially continuous manner during the time his policy was in effect.

V

That the Court erred in denying defendant's motion for a nonsuit at the close of the plaintiff's evidence, and renewed at the close of the entire case.

VI

That the Court erred in admitting in evidence plaintiff's Exhibits 1, 2, and 3, over objection of defendant, in that the admission of these exhibits deprived defendant of the right of cross-examination, and on the ground that they were self-serving declarations of plaintiff.

PERTINENT STATUTES AND REGULATIONS

Section 5 of the World War Veterans' Act as amended July 3, 1930, Public 522:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this

Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided,* That regulations relating to the nature and extent of the proofs and evidence shall pro-

vide that due regard shall be given to lay and other evidence not of a medical nature.

Section 13 of the War Risk Insurance Act (40 Stat. 555):

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and, for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: Provided, however, That payment to any attorney or agent for such assistance

as may be required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: And provided further, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard

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labor for not more than two years, or by both such fine and imprisonment.

Section 400 of the War Risk Insurance Act (40 Stat. 409):

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States upon application to the bureau and without medical examination shall grant insurance against the death or total permanent disability of any such person in any multiple of $500 and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided.

Section 402 of the War Risk Insurance Act (40 Stat. 615):

> That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them.

TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE

I, William C. DeLanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, hereby on this 15th day of October, 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

1. Insurance will be issued for any of the following aggregate amounts upon any one life: * * * Which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all, including months of disability already paid for in both cases except as otherwise provided.

2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates: * * *

Rates at ages higher or lower will be given on request.

The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be converted into a form selected before the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at net rates computed by the bureau according to the American Experience Table of Mortality and interest at 3½ per cent per annum.

3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

(T. D. 20 W. R.)

TOTAL DISABILITY

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative

to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments or insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DELANOY,
Director.

Approved.

W. G. MCADOO,
Secretary of the Treasury.

ARGUMENT

POINT 1

The court erred in denying defendant's motion for a nonsuit and in denying defendant's motion for a directed verdict.

Treasury Decision Number 20, page 10 of this brief, which is a regulation promulgated under sanction of law and of which courts will take judicial notice, defines a permanent and total disability within the meaning of the contract herein sued on to be "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation * * * whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." The courts have in the main approved this definition. Hence for plaintiff to be entitled to recover she must produce some substantial proof that the insured, John R. Blackburn, within the time alleged in her petition, namely, October 5, 1918, or within thirty-one days after November 1, 1918, had an impairment of mind or body which rendered it impossible for him to follow continuously any substantially gainful occupation and that such impairment of mind or body was founded upon conditions which rendered it reasonably certain that it would continue throughout his life.

The former judgment in this cause was reversed by this Honorable Court for the error of the learned trial court admitting in evidence the certificate of the coroner of Los Angeles County for the purpose of showing the cause of death.

In the opinion reversing the former judgment, 33 Fed. (2d) 564, l. c. 565, this court said:

> In view of a new trial, we need refer but briefly to the other assignment of error. While the testimony was ample to prove temporary total disability, no witness, professional or lay, testified as to the nature of the illness from which the deceased was suffering, or as to the cause of his disability. The jury was left wholly to speculation and guesswork on both of these questions. Furthermore, the record fully discloses the fact that more satisfactory testimony was within the reach of the appellee. The physician whom the deceased consulted six months after leaving the army was not called as a witness, nor was any reason assigned for not calling him. The same may be said of the failure to call any of the physicians who must necessarily have attended the deceased during his long confinement in the different hospitals. In short, the jury was left with little or nothing to guide them in determining the vital issues in the case. These deficiencies in the testimony can doubtless be supplied in some measure upon a retrial of the cause.

Therefore, one of the questions for determination in this appeal is whether on the retrial of this cause the plaintiff's proof overcomes the deficiency in the testimony at the former trial, pointed out in the opinion supra.

To meet the burden cast upon her, plaintiff called as witnesses at the retrial of her cause the following persons, who testified at the former trial, namely,

Jennie Blackburn, R. C. Polley, and Frank Renchey. If there is any material difference in the testimony of these witnesses given at the former trial and that given at the retrial, it is that their testimony at the retrial is not as favorable to plaintiff as that given at the former trial. However, the difference, if any, is too slight to warrant discussion.

In addition to the foregoing plaintiff produced as witnesses C. R. Christie, Dr. Elmer E. Lytle, and Roy B. Misener, none of whom testified at the former trial, and also introduced her Exhibits 1, 2, 3, and 4, which were not in evidence before.

The witness, Christie, was used solely to identify plaintiff's and defendant's exhibits.

The witness, Roy B. Misener, testified (R. 26, 27) that he saw deceased in bed after he (deceased) came back from the service. That deceased was in a run-down condition. That witness visited deceased many times and found him in bed most of the time.

On cross-examination (R. 27) this witness testified he never saw deceased do any work after discharge from the army, but that he understood that he, deceased, worked at the Wilson Mill a short time.

Dr. Elmer E. Lytle testified (R. 29, 30) that he is a physician and surgeon. That he treated John R. Blackburn, the last time being from May 1, 1925, until June 13, 1925. That he also treated him

when he was a child. That he found the deceased, John R. Blackburn, between May 1, 1925, and July 13, 1925, suffering from an advanced stage of tuberculosis—by advanced stage he means a later stage. That he could not tell just the number of years deceased had been suffering with tuberculosis, but it has existed over a rather long period of time. That he was totally and permanently disabled at the time witness examined him. That witness believes that deceased began to suffer with tuberculosis between the time he was gassed until the time he was first examined on July 19, 1921. That deceased was totally and permanently disabled if he was in the hospital.

On cross-examination (R. 30) this witness testified that if the deceased had active tuberculosis he should not follow any occupation. That witness should say deceased was totally and permanently disabled from following continuously any gainful occupation.

In answer to questions by the Court (R. 30, 31, 32) that witness further testified:

> The COURT. Not taking into consideration what followed, what would you say at that time how long had he been totally and permanently disabled?
>
> Answer. In my opinion, he should not work any time.
>
> The COURT. That don't answer it.
>
> Question. How long had he been totally and permanently disabled?

Answer. Well, from the time he first developed——

Question (interrupting). You said while ago, from the time he was gassed. How long would that be reasonably certain to continue in the future, from that diagnosis and what preceded?

Answer. Rest is one of the main requirements——

The COURT (interrupting). Answer the question, how long would it be reasonably certain to continue in the future?

Answer. If he needed rest, he should not work, that is all.

The COURT. How long would that condition be reasonably—the total and permanent condition—be reasonably certain to continue in the future?

Answer. Of course, that depends on so many things.

The COURT. You have everything before you. You have the hypothetical question before you—the conditions on down, his employment and relations and this diagnosis—you say from this diagnosis, he was permanently and totally disabled from the time of his discharge or from the time of being gassed—now, then, how long, based on the same hypothesis, would this total and permanent condition be reasonably certain to continue in the future, a year or two years or five years or life?

Answer. I know the results——

The COURT (interrupting). Not judging anything by the results.

Answer. Under the proper treatment——

The COURT (interrupting). Answer the question, if you want to tell us what you know; if you don't know, tell us and if you know, tell us.

Answer. Please ask the question again.

The COURT. You said, from what they asked you and the testimony as to the condition of the deceased from his discharge and this diagnosis, that on the 25th day of July, 1921, that you considered he was totally and permanently disabled from the date he was gassed in the army. Now, then, from the same hypothetical question and upon the same diagnosis, how long would you say the total and permanent disability condition would continue in the future?

Answer. If I remember——

The COURT (interrupting). Can you tell us?

Answer. No.

On redirect examination Doctor Lytle testified (R. 32) in answer to the:

Question. Doctor, I believe you testified he was totally and permanently disabled, was he, Doctor?

Answer. I said it probably developed between the time he was gassed until a diagnosis was first made.

On recross-examination this witness testified (R. 32, 33) that he is not a specialist in tuberculosis. That deceased's mother gave him the medical history at the time of the examination of deceased.

That the tuberculosis was not arrested when he examined the deceased in May, 1925. That he did not examine deceased at any time from September, 1919, until July, 1925. That he does not know the condition of deceased during the intervening time, that he may or may not have been working during that time. That he was the doctor for deceased's family. That he does not recall that deceased called upon him between the time he returned from service and the time he examined him in 1925. That he remembers seeing deceased, but did not examine him in a medical way.

Plaintiff's Exhibit 1 is a report of a medical examination made of deceased on July 25, 1921, as a result of which the following were made:

> Diagnosis: Tuberculosis, chronic pulmonary, rt. upper lobe, activity undetermined. 69—Adhesions of peritoneum, post operative.
>
> Prognosis: Guarded.

Plaintiff's Exhibit 2 is a report of a medical examination made of deceased on August 16, 1922, as a result of which the following were made:

> Diagnosis: Tuberculosis, chronic, pulmonary, moderately advanced, apparently arrested. Cicatrix of skin—appendectomy and drainage.
>
> Prognosis: Favorable.

Plaintiff's Exhibit 3 is a report of a medical examination made of deceased on January 15, 1924, as a result of which the following were made:

Diagnosis: Tuberculosis, pul. chr. advanced "B" active. Deviation of nasal septum.

Prognosis: Guarded.

Plaintiff's Exhibit 4 is a copy of Letters of Administration, as to which there is no dispute.

In the quoted part of the opinion, reversing the former judgment herein, we find the following statement: "The physician whom the deceased consulted six months after leaving the army was not called as a witness, nor was any reason assigned for not calling him." It is assumed that the physician whom the court had in mind, when making the statement just quoted, is the physician referred to by Russell Blackburn, a witness for plaintiff at the former trial. The testimony of this witness will be found on pages 29, 30, and 31 of the record in the former appeal. This witness testified, page 30 of that record: "We didn't know what was the matter with him. One time he got scared and went to a doctor. That was about six months after his discharge. It was prior to this time that he tried to work." In this connection may we impress upon the court that plaintiff did not see fit to recall this witness at the retrial of her cause and further that she again failed to use this physician as a witness and failed to assign any reason for not calling him, notwithstanding the admonition of this honorable court in this regard.

Defendant called as witnesses Doctors Arthur L. Barnes, Kirk Brown, A. C. Feaman, and Mr. C. E.

Wilson, all of whom testified at the former trial and who testified in substance as at the former trial.

In addition to the foregoing testimony, defendant put in evidence its Exhibit A–1, not offered at the former trial. This Exhibit is a report of a medical examination of deceased made March 31, 1920, as a result of which the following were made:

> Diagnosis: Conjunctivitis, chronic. Adhesions of peritoneum (following appendectomy).
>
> Prognosis: Good as to Conjunctivitis. Guarded as to Adhesions of peritoneum.

In the opinion, *supra,* this court said (l. c. 565):

> While the testimony was ample to prove temporary total disability, no witness, professional or lay, testified as to the nature of the illness from which the deceased was suffering, or as to the cause of his disability. The jury was left wholly to speculation and guesswork on both of these questions.

Therefore, let us see whether there was any substantial evidence adduced at the retrial, showing the illness from which the deceased was suffering or the cause of his disability, at a time while the contract sued on was in force.

In the case of *Owen Daten Nicolay* v. *United States,* decided by the Tenth Circuit Court of Appeals on June 30, 1931, the court said:

> Unless the plaintiff has produced some substantial proof that it was reasonably cer-

> tain, on or before May 2, 1919 (May 2, 1919, being the expiration date of the contract before the court)—Parenthesis ours—that his condition of total disability was one that would continue throughout his life, the case must be affirmed.

We think that the court in the *Nicolay case* announced the correct rule. Hence, for plaintiff in the case at bar to be entitled to recover she must have produced substantial proof showing that, during the life of the contract sued on, deceased not only had a total disability, but that it was then reasonably certain that it would continue throughout his life.

Plaintiff's witness Doctor Lytle did not see deceased until May 1, 1925, which was long after the lapse of the contract. While this witness testified that deceased was then suffering from an advanced stage of tuberculosis, he also testified that he could not tell the number of years he had been suffering therefrom. While, of course, it is not overlooked that this witness testified that he believed that deceased began to suffer with tuberculosis between the time he was gassed and the time he was first examined on July 19, 1921, there is no evidence in the record that deceased was gassed, or if gassed the date thereof. Therefore, this opinion of the witness is valueless in aiding plaintiff. This witness testified at some length both on direct, cross, redirect and recross examinations. However, it seems that the gist of his testimony is found in his

answer to the last two questions propounded by the trial court (R. 31, 32), namely:

> The COURT. You said, from what they asked you and the testimony as to the condition of the deceased from his discharge and this diagnosis, that on the 25th day of July, 1921, that you considered he was totally and permanently disabled from the date he was gassed in the army. Now, then, from the same hypothetical question and upon the same diagnosis, how long would you say the total and permanent disability condition would continue in the future?
>
> Answer. If I remember——
>
> The COURT (interrupting). Can you tell us?
>
> Answer. No.

From the answer quoted it is clear that this witness did not know and did not testify whether deceased had a permanent disability during the life of the contract in question.

It will be noted that Doctor Lytle testified that he believed deceased began to suffer with tuberculosis between the time he was gassed and the time he was first examined on July 19, 1921. In considering this testimony it must be borne in mind that deceased was not first examined in July, 1921, but was first examined on March 31, 1920. (See Defendant's Exhibit A–1), which examination shows that at that time deceased did not have tuberculosis. It is evident that this witness had not been advised of the examination made in March, 1920, but was

only advised of the examination shown by plaintiff's Exhibit 1, and that had he been aware of the fact that in 1920, deceased had no tuberculosis, it is assumed that his testimony in this regard would have been entirely different.

Plaintiff's Exhibit 1 is the report of a medical examination made of deceased in July, 1921, and while it shows that he had tuberculosis, it further shows that the activity was undetermined. It also shows that the prognosis was guarded. The diagnosis and prognosis speak for themselves and show that in the opinion of the doctor who made the examination that deceased did not have either a total or permanent disability.

Plaintiff's Exhibit 2 is a report of a medical examination made of deceased on August 16, 1922. This report also speaks for itself and shows that in the opinion of the doctor at that time, which is the material time, deceased's tuberculosis was arrested and conditions were favorable for his recovery. Certainly this is no evidence that at that time his disability was founded upon conditions which rendered it reasonably certain that it would continue throughout his life.

While plaintiff's Exhibit 3, a report of a medical examination made of deceased, shows that his tuberculosis was active and advanced, it also gives a guarded prognosis. However, in considering the value of this exhibit as evidence favorable to plaintiff, it must be borne in mind that this exam-

ination was made on July 15, 1924, long after the lapse of the contract.

However, the foregoing must be considered in the light of defendant's Exhibit A–1, which is a report of a medical examination of deceased made March 31, 1920, more nearly proximate to the life of the contract than any of the medical examinations put in evidence by plaintiff. This examination shows that deceased's lungs were negative, that is, that he at that time had no tuberculosis. The diagnosis made by the doctor making the examination is: Conjunctivitis, chronic. Adhesions of peritonium (following appendectomy) and the prognosis: Good as to conjunctivitis. Guarded as to adhesions of peritoneum.

Point 2

The trial court erred in denying defendant's petition for a new trial and in entering a judgment on the verdict.

For the reasons given in support of Point 1 of the argument the trial court should have granted defendant a new trial and should not have entered judgment on the verdict.

Point 3

The trial court erred in admitting in evidence plaintiff's Exhibits 1, 2, and 3.

As stated in the Argument on Point 1, these exhibits are reports of medical examinations made of deceased.

There was no testimony that the doctors who made these examinations were authorized to make same; that they were employees of the defendant at the time the examinations were made or otherwise; that the doctors were not available as witnesses or that the doctors whose names appeared as having made the examinations actually made them. Furthermore, these reports are hearsay in that they report simply what the doctor making them says he found upon examination of deceased and represent the conclusion and opinion of the doctor based on facts he says he found. Also these reports contain statements made by the deceased, which are clearly self-serving. In this connection it should be kept in mind that at the time the examinations were purported to have been made the deceased had applied to the defendant for compensation under the provisions of the then War Risk Insurance Act, and that the examinations, if made, for the defendant were for the purpose of determining whether deceased had any disability. Therefore, it was to the interest of the deceased that he have a disability and certainly any statements he made at such a time fall within the class of self-serving statements the same as any statement a person makes to a doctor who examines him for the purpose of testifying in his behalf, such statements being, the writers of this Brief understand, always excluded from evidence. Again by admitting these exhibits the defendant was denied its right of cross-examining the witnesses against it.

It is submitted that these reports were not admissible under the rule laid down in the cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, and certainly their admission is in conflict with the rule laid down in the case of *United States* v. *James W. Wilson,* decided June 17, 1931, by the Fourth Circuit Court of Appeals.

In the *Cole case* (l. c. 341), the court said:

> There was no error in the admission of appellee's Exhibits "H" and "I." These exhibits consisted of two reports of physical examinations of appellee each dated April 30, 1923, and signed by physicians of the Bureau. Only those parts of the reports which gave specific findings of fact were permitted in evidence. The examinations were made under the authority of the Director (Tit. 38, ch. 10, Sec. 426, U. S. C.) and were taken from the Bureau's files pertaining to appellee. It is insisted that these reports are (1) confidential and (2) hearsay. We can not agree. They are not confidential or privileged when required to be produced in any suit or proceeding pending in the United States Court (Tit. 38, ch. 10, Sec. 456, Clause (b), U. S. C., *Gonzalez* v. *U. S.,* 298 Fed. 1003) and in fact no privilege was claimed for them in the lower court. Further, we regard these reports as exceptions to the hearsay rule. They were made by the examining physicians under the sanction of official duty and as and for a permanent record of

> specific facts to be kept in the files of the Bureau. * * *

It will be noted that in the *Cole case* only that part of the reports which gave specific findings of fact were permitted in evidence, while in the instant case the entire reports, including the statements of deceased, were admitted.

In the *Runkle case* (l. c. 806), the court said:

> The plaintiff offered in evidence a statement purporting to be signed by one Doctor Maguire, and purporting to be an examination of the insured made on December 4, 1919. The report discloses an active pulmonary tuberculosis; an inability to perform any part of any occupation; concludes that his chances for recovery or arrest are remote. The report recommends a rating for compensation of "Temporary Total." The report was found in the files of the attorney for the United States Veterans' Bureau for the State of Colorado. To this proffer of proof the defendant objected on the ground that the evidence was incompetent and immaterial, that the document had not been identified; and that it was hearsay.
>
> The identification was not sufficient and the report was properly excluded. Since the case is to go back for another trial, we pass upon the other objections. If the report is properly identified as having been made by a doctor employed by the United States government, and that it is his report of a physical examination made of the insured, it is not incompetent. * * *

> This statute contemplates that those claiming the benefits of the War Risk Insurance Act may have access to such reports. Such access would be of little avail to the claimants if the reports could not be used in court. Moreover, the statute contemplates use in court by subjecting them to the process of the United States court. Furthermore, the generous attitude of the government toward the beneficiaries of the Veterans' Act repels any idea of a desire to conceal any material fact from the veterans or their beneficiaries. Particularly is this true of findings of a physical examination. The standing of the doctors employed by the Government is assurance of the integrity of their reports. In *Gonzalez* v. *United States,* 298 F. 1003, the district court required the government to produce for the examination of the plaintiff in a war risk insurance case, such reports and records. In *Evanston* v. *Gunn*, 99 U. S. 660, the Supreme Court held that the records of meteorological stations were admissible in evidence, such reports being of a public character, and made in pursuance of public duty. To the same effect see *M'Inerney* v. *United States* (1 C. C. A.) 143 F. 729. It is our conclusion that as far as material to the issues, the report of Doctor Maguire, if properly identified, is admissible.

It will be noted that the court in the *Runkle case* required that reports of the character of plaintiff's Exhibits should be properly identified. Further-

more, in view of the use of the language, "Particularly is this true of findings of a physical examination," and the language, "It is our conclusion that as far as material to the issues, the report of Doctor Maguire, if properly identified, is admissible," found in the opinion, *supra,* it is to be inferred that the court had in mind that only the physical findings of the doctor were admissible.

In the *Wilson case* (Not reported) the court said:

> Two main questions are raised by the appellant in its assignments of error; FIRST, that the court erred in admitting certain reports of physical examinations made of the plaintiff, which were contained in the files of the United States Veterans' Bureau; SECOND, that the court erred in not directing a verdict for the defendant.
>
> The reports in question, to the admission of which objection was made, were reports of physicians to the Veterans' Bureau, and contained, among other things, certain statements of plaintiff himself, made during the examination. In *United States of America* v. *Wescoat*, decided by this court, April 13, 1931, Judge Parker exhaustively discusses the question of the admission of evidence of this character, and this court held that the evidence in that case was admissible, because it constituted the "best evidence possibly obtainable," but, in the *Wescoat case,* there was no question of the admission of anything other than the certificate of the physicians,

and the field hospital tags were entries made by the field hospital physicians in the ordinary course of professional duty. The physicians themselves were not available as witnesses, and the tags constituted the best evidence as to the findings of the physicians. In this case there is no showing that the physicians making the reports could not have been obtained as witnesses, and the judge admitted the entire report, including what may well be termed self-serving declarations, made by plaintiff at the time of the various examinations.

The cases of *Runkle et al.* v. *United States,* 42 Fed. (2) 804, and *United States* v. *Cole,* 45 Fed. (2) 339, relied upon by attorneys for the plaintiff, are easily distinguished from the instant case, and assuming without deciding that the reports in those cases were properly admitted, these decisions are not controlling here. The admission of the records as they were here admitted is, in our opinion, reversible error.

For the foregoing reasons it is respectfully submitted that the judgment herein should be reversed.

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United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
Special Counsel, Veterans' Administration.
BAYLESS L. GUFFY,
Attorney, Veterans' Administration.

U. S. GOVERNMENT PRINTING OFFICE: 1931

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6436

UNITED STATES OF AMERICA,
Appellant

v.

JENNIE BLACKBURN, as Administratix of the Estate of John R. Blackburn,
Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

Brief of Appellee, Jennie Blackburn, Etc.

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Brief of Appellee, Jennie Blackburn, Etc.

STATEMENT OF THE CASE

As stated in the Appellant's brief, this is the second appeal in this case upon re-trial after reversal by this Court, the opinion being reported in 33 Fed. (2d) 564.

John R. Blackburn, deceased, enlisted in the United States Army on the 30th day of March, 1917, and applied for a policy of war risk term insurance as soon as the same became available, on or about the 16th day of November, 1917, and the premiums thereon were paid up to and including the month of September, 1919, on the 25th day of which month the defendant was discharged, and on the 10th day of December, 1925, the insured died from pulmonary tuberculosis. Thereafter a claim was filed for his insurance with the United States Veterans Bureau, upon the denial of which this suit was instituted (R. 1-3). These facts are admitted by the defendant in its answer (R. 3-6), and the only question raised by the pleadings is whether or not the plaintiff was totally and permanently disabled from following continuously a substantially gainful occupation from the date of discharge, in accordance with the allegations of the plaintiff's complaint (R. 2). The jury found upon the evidence that the deceased was so disabled from and after September 25th, 1919, the date the deceased was discharged from the Army, and in accordance therewith, returned a verdict for the plaintiff (R. 8), upon which judgment was entered (R. 8), and the several assignments of error relied upon raised but two questions. First, the sufficiency of the

evidence to sustain the verdict, and, second, the admissibility of plaintiff's Exhibits 1, 2 and 3, over the objection of the defendant, which Exhibits are reports made by Government doctors upon examination of the deceased at times prior to his death. These questions will be argued separately.

I.

First question raised by the defendant in its brief is the question of the sufficiency of the evidence. In arguing this point, reference must necessarily be made to the evidence as contained in the record (R. 21-39).

The witness Frank Renchey testified in substance that he had known the deceased since his birth and that at the time he, the decased, went into the service, he was a "good, rugged boy" (R. 22). And that after his return from the service the deceased had "a slight cough all the time and his complexion was sallow and very yellow" (R. 23). Also the witness testified concerning the deceased's few attempts to work, that while the deceased was working he would get sick at his stomach, sometimes several times a day, during which time he would have to leave his work and be gone for fifteen or twenty minutes (R. 22).

This testimony was followed by that of the witness R. C. Polley, for whom the deceased worked during the months of April, May, June and July of 1921, during which time he worked but about half the time. During the time the deceased worked for this witness, he would have sick spells, at which time the witness would send him home. He would have "spells of coughing and would have to sit down or lie down" (R. 24). Also, "he would vomit if he would lift anything at all times of the day" (R. 24).

The witness Roy B. Misener, whose testimony is contained on pages 26 and 27 of the Record, knew the deceased and was a friend of his prior to the war, and saw the deceased in bed the first or second day after his return from France, when the witness went to visit the deceased. This witness also visited the deceased several times and "usually found him in bed most of the time" (R. 27).

The other lay witness, and probably most reliable witness, was the plaintiff herself, who is the mother of the deceased, and from her testimony, contained on page 28 of the Record, we find the deceased spent several winters prior to his death in Government hospitals. We also find that shortly after his discharge and prior to his confinement in the hospitals he at-

tempted to do some work; that during the time he attempted to work "he would not be able to eat when he came home at night" (R. 28). And "he would have a coughing spell, and vomit, and then go to bed" (R. 28). It is also evident from the testimony of this witness that prior to his attempting to work he tried to do chores around the house, and "after he did chores he would get sick and tired. He was worn out." (R. 28.)

We fiind that the work which the deceased did, beside that heretofore mentioned, during the Spring of 1921, was work in a shingle mill for a month or so commencing January, 1920. This is the statement of the witness C. E. Wilson, for the defendant (R. 33-34). And during the time he worked for Wilson "He complained that he did not feel well" (R. 34).

Doctor Elmer E. Lytle, who testified on behalf of the plaintiff, found the deecased suffering from an advanced stage of tuberculosis in May of 1925, which tuberculosis had continued over "a rather long period of time" (R. 29). The Doctor's testimony is substantiated by plaintiff's Exhibits 1, 2 and 3, which are reports of examinations made by the Government doctors at different times during the confinement of the deceased in the various hospitals where he spent practicaly the entire four years prior to his death.

This evidence is ample to support the finding of the jury that the deceased was totally and permanently disabled from following continuously any substantially gainful occupation from the date of his discharge. It will be borne in mind that during the six years between the date of discharge and the date of death the deceased spent four of those years in Government hospitals and all but approximately six months of the remaining two years at home, and confined a large portion of this time to his bed. His efforts at work, while honest, were notoriously unsuccessful, working but about a month in the early Spring of 1920 and about four months in the late Spring of 1921 . . . actually working but half of this time.

Attention is called to the opinion of the late Judge Rudkin in the former appeal of this case, 33 Fed. (2d) 564, wherein he said:

> "While the testimony was *ample* to prove temporary total disability, no witness, professional or lay, testified as to the nature of the illness from which the deceased was suffering, or as to the cause of his disability."

It is submitted that the use of the word "temporary" in the foregoing quotation was inadvertently used in view of the fact that the insured is long since

deceased. And it is also submitted that the testimony of Doctor Lytle and the plaintiff's Exhibits 1, 2 and 3 are ample to show the nature of the disability from which the deceased was suffering. It must also be borne in mind that the reversal of the previous appeal was based upon the erroneous admission of a death certificate showing tuberculosis as the cause of death.

This case seems to come clearly within the doctrine announced by this Court in the case of *LaMarche v. United States* 28 Fed. (2d) 828, in which this Court said:

> "But the burden was only on the plaintiff to prove permanent disability, and that such disability arose during the life of the policy. Mere inability on his part to prove the exact time and place of the injury to the hip was not fatal to his case if the jury was warranted in finding from the testimony that the injury and the accompanying disability occurred and existed during the life of the policy and we think the testimony was sufficient to warrant such a finding. After August 4th 1919, the plaintiff in error was confined to hospitals for nearly a year and a half, and there is ample warrant for finding total permanent disability from and after that date. We think also the testimony would warrant a finding of total permanent disability at a much earlier date and while the policy was in effect. His condition and symptoms after August 4th, 1919, did not differ materially from his conditions and symptoms prior to that date, and if conditions

> existing on and after August 4th are attributable to the injury to the hip might not the jury well find that similar conditions existing prior to that date arose from the same cause?"

As in that case, so in this, the same symptoms existed immediately after discharge as existed subsequent thereto, and the plaintiff had attempted to work and failed, and in this case as in that, the jury was warranted in finding the deceased totally and permanently disabled from and after the date of his discharge.

Total and permanent disability is the loss upon which this policy is payable, and upon a fair showing that the deceased was unable to work continuously from the time of his discharge, he is entitled to recover, regardless of the fact that there is no medical evidence other than that contained in plaintiff's Exhibits 1, 2 and 3, prior to 1925. It is unquestioned that the cause of death was tuberculosis, and it is apparent from these exhibits that the deceased was suffering from tuberculosis in 1921, and, as said by this Court in the case of *Mulivrana v. United States*, 41 Fed. (2) 734.

> "The nature of the malady from which the appellant was suffering (tuberculosis) makes it reasonably certain that the condition found upon the examination in 1921 had existed for some period prior thereto * * *."

The attention of this Court is also called to the case of *United States v. Godfrey*, 47 Fed. (2d) 126, wherein the claimant was first diagnosed as tubercular in 1925, prior to which time the plaintiff testified as to his inability to work and to his cough, and though it appears that the plaintiff did work practically from the time of his discharge until 1927, the Circuit Court sustained the verdict and, quoting the trial judge, said:

> "It sems * * * that the evidence before the jury tended to show that the plaintiff had active tuberculosis from the time of his discharge from the Army * * *.
>
> "A man with active pulmonary tuberculosis requires absolutely rest treatment, and may very properly be considered permanently and totally disabled unless his disease is arrested, which never occurred in the instant case."

The foregoing case was followed by this Court in the recent decision in *United States v. Lawson*, 50 Fed. (2d) 646. In the case at bar we are not, however, confronted with any long period of work . . . as in the *Lawson* and *Godfrey* cases, but, rather, the record herein is replete with evidence of the deceased's inability to work.

The cases are numerous which lay down the principle that lay evidence is sufficient to sustain a verdict for the plaintiff even where medical evidence is

contrary and the reason therefore seems to be well stated by the Circuit Court of Appeals for the Tenth Circuit in the case of *Barksdale v. United States*, 46 Fed. (2d) 762, wherein the Court said:

> "Medical men indulge very generally in theorizing on the affairs of life, while the living of life is a very practical affair."

Other cases to the same effect are:

Malavski v. United States, 43 Fed. (2d) 974;

Vance v. United States, 43 Fed. (2d) 975;

United States v. Phillips, 44 Fed. (2d) 689;

Sprencel v. United States, 47 Fed. (2d) 501.

In the last case the lay evidence of inability to work from date of discharge was substantiated only by medical examination as late as 1926. See also the late case of *United States v. Tyrakowski*, 50 Fed. (2d) 766.

It seems unnecessary to quote to this Court the numerous interpretations of total and permanent disability, such interpretations being now well settled by law, and it is submitted that the evidence in this case is much stronger than that contained in several of the cases cited, and as was said by the late Judge Rudkin in the last appeal of this case, "The testimony was ample to prove * * * total disability," the permanency of which was demonstrated by death.

II.

Passing to the second question raised by the Appellant, namely the admissibility of Government records and examinations by Government doctors, the Court's attention is directed to the objection made by counsel for the defendant, which objection was directed to the whole of the Exhibits, and admitting for the purpose of this argument only that the documents do contain self-serving declarations which would ordinarily be inadmissible, still, the objection being general and directed to the whole Exhibits, was insufficient, and the trial court must necessarily have admitted the Exhibits. See *United States v. Stamey, et al*, 48 Fed. (2d) 150.

The defendant's brief on this point seems to raise the question of admissibility upon three grounds. First, that the reports contain statements which are self-serving declarations; second, that the defendant was deprived of its right of cross-examination; and, third, that the Exhibits were not properly identified.

It would seem that the question of admissibility of these reports has been decided by this Court in the case of *United States v. Stamey, et al, supra*, and by the Tenth Circuit Court of Appeals in the case of *Runkle v. United States*, 45 Fed. (2d) 804, and in the Fourth Circuit by the case of *United States v.*

Cole, 45 Fed. (2d) 339. Also this Court concurred in the admission of such documents by its affirmance in the case of *McGovern v. United States*, 294 Fed. 108, affirmed 299 Fed. 302. See also *Nichols v. United States*, 48 Fed. (2d) 203.

It must be borne in mind that the statements complained of in these Exhibits were obtained by the defendant under authority conferred upon the Veterans Bureau by Congress, vesting the Bureau with statutory authority to examine, report, determine and act under the War Risk Insurance Act, and such records being required by law to be kept, are public documents, and for that reason are competent evidence in actions on war risk insurance policies. See *McGovern v. United States, supra.* Also, in view of the fact that these statements were obtained and were given for the purpose of treatment, the same should be admissible in evidence under the rule permitting a physician to testify as to the subjective ailment and history of a patient obtained by said physician during the course of examination for purposes of treatment, which are presumed to be true by reason of the fact that the statements are made for the purpose of treatment, and are excepted from the hearsay rule.

The objection that the defendant is deprived of its right of cross-examination is without avail under the

decisions heretofore quoted. Consequently it seems unnecessary to discuss that phase in this brief.

Likewise the third objection, that there was no proper identification, is without merit. First, because the records were identified by the witness Christie, who testified that they were part of the regular record of the United States Veterans Bureau (R. 25); and, secondly, because the objection was not based upon failure to identify the record, and it is a well settled rule of law that an objection cannot be raised for the first time upon appeal, nor can the Appellant change the ground of his objection upon appeal.

The United States Circuit Court of Appeals for the Seventh Circuit recognized the admissibility of doctors' records such as these, which are a part of the Bureau files, *in toto*, by its constant reference to the subjective symptoms contained upon such record, which were introduced in evidence in the case of *United States v. Tyrakowski, supra.*

It is respectfully submitted that the appeal herein is without merit and that the judgment of the trial court should be affirmed.

Respectfully submitted,

GRAHAM K. BETTS,
Attorney for Appellee.

No. 6439

United States

Circuit Court of Appeals

For the Ninth Circuit.

PETER SEKINOFF,

Appellant,

vs.

N. P. SEVERIN COMPANY, a Partnership of Which N. P. SEVERIN and A. N. SEVERIN are Members,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

HELLENTHAL & HELLENTHAL, Juneau, Alaska,
Attorneys for Appellant.

H. L. FAULKNER, Esq., Juneau, Alaska,
Attorney for Appellee.

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 3064–A.

PETER SEKINOFF,

Plaintiff,

vs.

N. P. SEVERIN CO., a Partnership of Which A. N. SEVERIN and N. P. SEVERIN are Members,

Defendant.

COMPLAINT.

Comes now the plaintiff and for cause of action, complains and alleges:

I.

That the defendant is now and at all the times hereinafter mentioned was a partnership, of which A. N. Severin and N. P. Severin are members, duly organized and existing and engaged in the construction of a public building in Juneau, in the

Territory of Alaska; and that said defendant does now and at all of said times did, employ more than five employees in connection with said construction work.

II.

That on or about the 14th day of January, 1930, the plaintiff, who was on said date, for some time prior thereto had been, an employee of and employed by the defendant as a common laborer in its said construction business, while he was so employed by the said defendant in shoveling dirt in and about its construction work in the City of Juneau, Alaska, accidentally received personal injuries, which injuries arose out of and in the course of his said employment by and with said defendant. The said plaintiff, while shoveling dirt as aforesaid, was hit with some foreign substance in his left eye, the actual substance being unknown to this plaintiff, which injuries so received by the plaintiff are permanent and has resulted in the total loss of sight in his left eye the exact reason for such loss of eyesight the plaintiff does not know, and the strain and injury to the left eye has injured plaintiff's right eye, by causing irritation and strain in said right eye which said injuries have destroyed fifty (50%) [1*] per cent of plaintiffs' earning capacity and the plaintiff is now able to earn only fifty (50%) per cent of what he could earn before the injury.

III.

That prior to the time that said plaintiff re-

*Page-number appearing at the foot of page of original certified Transcript of Record.

ceived said personal injuries, neither the plaintiff nor the defendant had given notice of his or its election to reject the provisions of Chapter 98, Alaska Session Laws 1929, approved April 16, 1929, known as "The Workmen's Compensation Act of Alaska," and entitled

> "An Act Relating to the measure and recovery of compensation of injured employees in all business, occupations, work, employments, and industries employing five or more employees in the Territory of Alaska, except domestic service, agriculture, dairying and the operation of railroads as common carriers, and relating to the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such business and industries and repealing Chapter 71, Session Laws of Alaska, 1915, Chapter 98, Session Laws of Alaska, 1923, Chapter 63, Session Laws of Alaska, 1925 and Chapter 77, Session Laws of Alaska, 1927 all relating to the same subject and repealing all Acts and parts of Acts in conflict with this act, and declaring an emergency."

IV.

That the said plaintiff at the time of his injury above set forth was unmarried and had nobody dependent upon him for support.

V.

That Two Hundred Fifty ($250.00) Dollars is

reasonable attorney's fees for bringing and prosecuting this action.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Two Thousand Seven Hundred ($2,700.00) Dollars, together with Two Hundred Fifty ($250.00) Dollars attorney's fees and his costs and disbursements herein incurred.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff,

Address: Over First National Bank, Juneau, Alaska.

United States of America,
Territory of Alaska,—ss.

Peter Sekinoff, being first duly sworn on oath deposes and says; that he is the plaintiff in the foregoing action, that he has read the foregoing complaint, knows the contents thereof and that the same is true as he verily believes. [2]

PETE SEKINOFF.

Subscribed and sworn to before me this 16th day of May, 1930.

[Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My com. expires 1/22/34.

Filed May 16, 1930. [3]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant, N. P. Severin Com-

pany, and answering plaintiff's complaint, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in Paragraph I, except that defendant is a corporation, which allegation the defendant denies; and alleges that it is a copartnership, consisting of N. P. Severin and A. N. Severin.

II.

Referring to Paragraph II, defendant admits that on or about January 14, 1930 plaintiff was in defendant's employ; admits that he was in such employ for a short time prior thereto; denies that he accidentally received any personal injuries arising out of and in course of his said employment by defendant; and denies each and every other allegation contained in said paragraph.

III.

Defendant admits the allegations contained in Paragraph III.

IV.

Defendant admits that plaintiff is unmarried and has no dependents, and admits that he was unmarried and had no dependents at the time he was in the employ of said defendant, as alleged in Paragraph IV. [4]

V.

The defendant denies the allegation contained in Paragraph V.

WHEREFORE, defendant prays that this action be dismissed and that it recover its costs and disbursements herein from the plaintiff.

H. L. FAULKNER,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

I, R. M. Curtis, being first duly sworn, depose and say:

That I am agent and superintendent of N. P. Severin Company, a copartnership, the defendant, and make this verification on its behalf. That I have read the foregoing answer and know its contents, and that the facts stated therein are true and correct as I verily believe.

R. M. CURTIS.

Subscribed and sworn to before me this 11th day of June, 1930.

[Seal] H. L. FAULKNER,
Notary Public for Alaska.

My commission expires Aug. 2, 1932.

Copy received June 11, 1930.
HELLENTHAL & HELLENTHAL,
Attys. for Plaintiff.

Filed Jun. 12, 1930. [5]

Filed Mar. 23, 1931.

[Title of Court and Cause.]

STATEMENT OF FACTS.

BE IT REMEMBERED, that on this 11th day day of February, 1931, at the hour of 10 o'clock A. M. the above-entitled case came on for trial in the above-entitled court before a jury, the Honorable Justin W. Harding, District Judge, presiding; the plaintiff appearing in person and by S. Hellenthal, Esq., of Hellenthal & Hellenthal, and by George B. Grigsby, Esq., his attorneys; the defendant appearing by H. L. Faulkner, Esq., its attorney.

Both sides being ready for trial, the following occurred:

THEREUPON a jury was duly empaneled and sworn to try the case. Counsel for both parties made their opening statements to the jury; and thereafter the following proceedings were had and done, to wit: [6]

The plaintiff, to sustain the issues, offered the following sworn testimony:

TESTIMONY OF LOUIS DELEBECQUE, FOR PLAINTIFF.

LOUIS DELEBECQUE testifies that he is the timekeeper for the N. P. Severin Company, and he has the *the* time-books for the week ending January 16, 1930; that he is not certain as to whether the name of Peter Sekinoff appears on the December time-cards, that he would have to look it up, Mr.

(Testimony of Louis Delebecque.)

Faulkner admitted that it does; Mr. Faulkner has the time-card for January 16, 1930, the time-book for that week; that the name of the plaintiff appears on the time-book; that it shows that he worked for the defendant company on the tenth, eleventh, twelfth, thirteenth, and fourteenth, as shown by the time-book; that he worked eight hours on the fourteenth which is a full day; that he worked a full day on all of those days and that was the last day he worked in January. [7]

TESTIMONY OF PETE SEKINOFF, FOR PLAINTIFF.

PETE SEKINOFF testifies that he worked for the N. P. Severin Company in 1930, January 10th to 15th and also in December, 1929; that he is uncertain of the number of days he worked in January; that he worked with a pick and shovel; that he made an eight-foot fill, one eight by ten, and one man to each hole; that he dug a hole in front, while digging he struck a rock which bounced up and hit him in the eye, that the rock was about two or three inches in diameter; that the shifter, Carney by name, was behind him and helped him clean the dirt out of his eye, and the shifter informed him that it was all right then; that he worked a day or two more and then asked the shifter if he could see a doctor, the shifter took him to the superintendent's office, then sent him to a doctor; that before that time he never had any trouble with his left eye but

(Testimony of Pete Sekinoff.)

had some trouble with his right eye; that he could see fairly good with his left eye when he started to work; he can see no one now with his left eye; that at the time he filed suit his eyesight seemed a little improved, but now his eyesight is worse; that he went back to the defendant company for employment but was told there was no place for him; that Dr. Dawes examined him; that he worked at Ketchikan a short time but was unable to hold his job; that his right eye was very tired then.

Cross-examination.

That he has lived in Alaska for twenty years and is forty-seven years of age; that during that time he has worked in Interior Alaska, and he worked around [8] Juneau and in the Alaska Juneau Mine in nineteen eight, nineteen twenty-eight; that he worked steady for the defendant company but was laid off; that he believes he worked the whole month of December but is uncertain; that in nineteen twenty-seven he worked for the Cold Storage; that when he was working in the Cold Storage plant he had no trouble with his left eye; that six months before his left eye was hurt, his right eye bothered him; that he does not know what caused the trouble to his right eye; that he only had the trouble for about six months; that in 1927 he had no trouble with either eye and received no treatment for either eye; that he had no trouble with either eye when he worked for the Alaska Juneau in 1928 and 1929; that six months before he was injured his right eye troubled him but he never had trouble in 1927

(Testimony of Pete Sekinoff.)

with his eyes; that in 1926 he was in Seattle and had no trouble with his eye; that he did not have a contract on a road in Seattle or Spokane; that he never applied for work down there; that he never applied for work under state contract; that he had no trouble with his eye; that in 1925 he was in Seattle, working there; that in 1924 he was in the penitentiary and had no trouble with his eye; that he was in the penitentiary for six years, and had no trouble with his eye; that the first time he had trouble with his eye was six months before he got hurt at the Capitol Building; that while working for the Cold Storage or before that time he never was treated by a doctor, for his eye; that he does not know what went into his eye at the Capitol Building and never did know, nor what it did to his eye; that his eye began to bother him while he was working for the Alaska Juneau, he didn't know what it was but something [9] was wrong with his right eye; that while he was picking out something at the Capitol Building a rock hit him on the eye, the left eye; that he swore in the complaint that he did not know what hit him in the left eye; that he did not know what was meant by a cataract; that Dr. Dawes told him at one time that he had a cataract in his left eye; that Dr. Council also told him he had a cataract on his eye; that Dr. Pigg gave him a prescription and told him to wash his eye and soon it would be better; that two months ago Dr. Pigg told him that his eye was all right; that Dr. Pigg was the company doctor; that two months

(Testimony of Pete Sekinoff.)

after he was injured Dr. Pigg told him that his eye would be all right; that he went to see Dr. Council the same day he saw Dr. Pigg; that he went to see Dr. Council on his own accord; that several days after he was hurt he went to see Dr. Pigg; that Dr. Pigg treated him nearly two months; that after that he went to see Dr. Council, two months after his eye was hurt; that it was then that Dr. Council told him if he paid him $250.00 he would operate on plaintiff; that the Dr. merely told him he needed an operation on his eye; that on the 29th of November last, he went to see Dr. Council in company with Mr. Hellenthal and Mr. Faulkner; that he does not know what Dr. Council said at that time; that the only time he treated with Dr Pigg was for two months, after the accident and never before the accident; that he did not know he had a cataract on his eye; that he did not know if Dr. Pigg was the company doctor or not, or who was the company doctor; that he does not know the exact date but he got the dirt in his eye some time between January 10th and 15th; that he worked there until the night of the fourteenth, he believes, a full day; that Dr. Dawes gave [10] him a letter to give to the superintendent; that he gave the letter to the bookkeeper who threw it in a box, saying that he didn't care for that; that he does not know what was in the letter Dr. Dawes wrote as he did not read it; that he gave it to the timekeeper; that for the first two months Dr. Pigg treated him; that at that time he did not offer to pay Dr. Pigg $100.00

(Testimony of Pete Sekinoff.)

if he would give him a certificate that his eye was injured; that after the suit was brought he went to Ketchikan; that he tried to get work in Ketchikan; that he worked for the sawmill; that he did not work for the Prohibition Director this summer and never did any work for him; that at one time he had been convicted of a crime; that he never had any trouble with his eye while in Seattle nor any trouble with his eye while working for the Cold Storage Company; that while working for the Alaska Juneau he never had any trouble with his eye, except his right eye about six months before he got hurt; that the left eye was never troubled before he got hurt.

Redirect Examination.

That he was in Nome, Alaska in 1909 and while there worked for several years, for himself as a miner, and at another time for a company; that when he had trouble with his right eye he went to Dr. Pigg which was in 1929; that at that time he was working for the Alaska Juneau; that after he got hurt he went to Dr. Pigg because the superintendent told him to; that he treated with Dr. Pigg for two months; that after he left Dr. Pigg he went to Dr. Council; that after he saw Dr. Council, he went to Dr. Dawes; that he only went to Dr. Dawes once, at which time Dr. Dawes gave him the note.

Recross-examination.

That Curtis and the shifter sent him to Dr. Pigg; [11] that he does not know where Curtis or the

(Testimony of Pete Sekinoff.)

shifter now are; that he never treated with Dr. Pigg before the accident; that in 1929 he did not treat with Dr. Pigg; that in 1929 his right eye troubled him, about six months before he was injured; that that was all the treatment he had with Dr. Pigg; that in January, 1930, the left eye and in 1929 the right eye was troubled; that he does not know where his right eye was injured; that he did not want Dr. Pigg to give him a certificate to the Alaska Juneau mine that he got his eye hurt there; that in 1929 while working for the Alaska Juneau was the first time he was treated by Dr. Pigg for his right eye; that he knew Dr. Pigg for a long time but never had any treatment from him before that time.

Redirect Examination.

That he went to Dr. Pigg for nearly six months for his right eye.

Witness excused. [12]

TESTIMONY OF DR. DAWES, FOR PLAINTIFF.

Dr. DAWES testified: That I am a practicing physician and surgeon; and that I have been for a considerable time; that I know Peter Sekinoff; that I do remember him coming to see me some time in March, 1930; that at that time I did examine his eye; that the condition of the eye was a cataract; that at that time I got the history of the case and made out a note for the boss; that the note was—to

(Testimony of Dr. Dawes.)

give it attention; that at the time I examined the eye, he said there was no sight in it; that there is no sight in the eye now; that to my best judgment it seems that he is telling the truth, from the looks of it; that at the time I examined the left eye, I did not know what it indicated, except to take his word for it, then, I would say it was traumatic, that was the history he gave me; that from the history I would say it was traumatic; that there was no way of telling at the time I sent this note how long he had had this cataract; that it might have been two weeks, might have been a year.

Cross-examination.

That this was March, 1930, as I remember; that I gave him a note to the company; that he returned the note to me and I threw it away; that at that time he had a cataract; that I have examined the eye since; that he still has the cataract and I should call it ripe; that it is ready for removal; that there is no way to tell from the examination of the eye what caused the cataract; that the effect of the cataract on the eye is that it is so big that light can't get in; that when the cataract is removed, light can get in, but you have to replace the lens with artificial lens, but you can't see; that with glasses you can see; that this cataract is ripe, I am not an *experience* man in that work; that all I know [13] what happened to him is what he told me.

Redirect Examination.

That from my observation the cataract could

(Testimony of Dr. Dawes.)

have been caused by the injury he described to me; that from my experience and the examination of this eye I would say that he can see with the other eye; that he cannot see with the left eye; that he might have some light preceptions, I didn't test that; but not enough to see anything.

Recross-examination.

That there are a number of different causes of cataracts; the two most frequent causes are senility and acute trauma; that I believe it does occur in diabetes, certain clinical diseases; that the most common form of cataract is senile; that that occurs after forty or fifty years of age, as a rule; that they can generally be removed; that a traumatic cataract is a cataract caused by an injury; that some authorities state, to cause a traumatic cataract, there must be a rupture of the lens, so that the acreous humor or fluid in the chamber penetrates that capsule, turning the fluid white; that (indicating on chart) this is the lens; this is the anterior chamber; that the chart represents the eye and eyelid; that it represents a cross-section of the eye; that this is the cornea; this is the anterior chamber or acreous humor; this is the lens and this the posterior chamber or vitreos; that this is the eyelid here, closed. Some authorities claim a traumatic cataract is due to rupture of this membrane here (showing on chart); that is called the capsule covering; I forget the name of it; that is what I call the capsule, that allows this fluid to soften or change that tissue

(Testimony of Dr. Dawes.)

and change it to white; that the lens is a thicker, clear substance, than this; that it is gelatinous, but clear; that traumatic cataract is caused by rupture of the capsule; that it is rupture of the [14] capsule lens permitting the acreous fluid to get into the lens; that is caused in a traumatic cataract from a force of some kind exerted on the anterior part of the eyeball; that it could be a blow or some*that* that pierces the capsule; that ordinarily a piece of dirt getting into the eye, showing no evidence of piercing the capsule, would have to be pretty good sized, with sufficient force to exert force enough to rupture that membrane, according to the best authorities; that there was no evidence, when I examined Mr. Sekinoff, of anything having penetrated that; that if a blow was struck on the eye and if it was piercing you would have an injury showing on the surface of the cornea, but if it is with a blunt instrument with sufficient force to cause rupture, it might cause it without trauma showing on the surface; that there was no such evidence of any such thing on Peter Sekinoff; that the effect on the patient, of that kind of a blow or that sort of piercing the capsule would be pain and immediate pain; that it would be possible for a man to go on with his work after, if he suffered such a blow; that it would cause him considerable pain at the time; that if an ordinary piece of dirt, sand or mud going in there causing a rupture of the capsule would be sufficient to cause trauma, I would have to know the size of it, know the swiftness of it;

(Testimony of Dr. Dawes.)

that it would have to drive with considerable force and have some size to it; that the effect upon eyesight of an injury of that kind, there probably might not be very much; it depends upon the injury; there might not be very much immediately, but usually there is; usually there is inflammation and watering of the eye.

Recross-examination.

That in removing a cataract, they make a little incision through here like this: that little flap comes out this way; they go down here with a little hook, tear a hole in the capsule, and with pressure above, here, it forces the capsule [15] out through the wound, and smooth this over; and it heals; there is a loss of this liquid, but it fills up again; that glasses take the place of the lens or otherwise there would be no sight.

Redirect Examination.

That it would make a difference whether the ground was frozen or not frozen, if it was hit with a blunt instrument; that if it hit the eye hard enough it might cause traumatic cataract; that it would not necessarily leave indications that could be shown two months after; that this lens (indicating on chart) takes the place of human lens; that this lens, that is removed and replaced has to be adjusted to distance; that if you get a lens for one distance you can't use it for another distance, but must have two lenses; that if you look a distance—you have to have your lens adjusted for

(Testimony of Dr. Dawes.)

certain distance; that if you looked beyond that distance it couldn't co-ordinate with the other eye—I wear a lens for distance and make it do. Of course there is something to that. I don't know as I could explain it to the jury—but the human lens has power to change itself to a certain extent, and when it is gone you have lost the power of accommodation; that if you have one eye with a human lens and the other with an artificial lens, they do not co-ordinate. Lots of times you are unable to bring the operated eye up to normal and they don't act the same, and it creates a certain amount of blurring; that in the case of the loss of the other eye it would be very important to use an artificial lens; that should you lose the good eye then there would be a great advantage in the artificial lens.

That is all.

Mr. FAULKNER.—I want in connection with the doctor's examination, to introduce the chart as defendant's exhibit. [16]

Mr. HELLENTHAL.—No objection.

The COURT.—It may be marked Exhibit 1 for the purpose of illustration.

(Eye chart was then marked Defendant's Exhibit 1 for illustration.) [17]

TESTIMONY OF T. L. CHIDESTER, FOR PLAINTIFF.

T. L. CHIDESTER testified: That I know the plaintiff, Peter Sekinoff; that I knew him in the

(Testimony of T. L. Chidester.)

fall of 1929, knew him fairly well; that I saw him quite often; that in the spring of 1930, I did notice this man's condition; that I observed the cataract on Peter's left eye; that I first observed it last March; that I did observe his left eye in the fall of 1929; that the cataract was not there at that time; that I did not see any cataract in December, 1929, and I observed him at that time.

Cross-examination.

That I have known Pete about four years; that I have known him pretty well; that I happen to know him because he came up to the prohibition office several times; that he did work for me; that the only thing I know—what a cataract is—is a white scum over the eyeball; that I don't know if that is the only thing that causes a white scum over the eyeball; that an object in the eye, I have been told, causes a cataract; that is a foreign object in the eyeball, there might be other things that cause it, I don't know; that I do not know what pterygium is; that I do not know what conjunctivitis is; that the lens of the eye is outside; that the vitreous humor is inside; that the retina is in the back, I think. [18]

TESTIMONY OF E. H. MEYER, FOR PLAINTIFF.

Mr. E. H. MEYER testified: That I have seen Peter Sekinoff around Juneau; that I first saw him when I came to Juneau about November 15th, 1929,

(Testimony of Mr. E. H. Meyer.)

in the prohibition office talking to Mr. Chidester; that I saw him about twice, I believe, prior to Christmas; that I saw him after he returned from Ketchikan after Christmas, probably about March of 1930; that Mr. Chidester was present when I saw him in March of 1930; that I know what a cataract is; that I don't know what I saw in his eye; I saw some inflammation in one of his eyes; that I don't remember which eye it was; that there was no inflammation in his eye in the fall of 1929.

Cross-examination.

That I have known him since 1929; that each time I saw him in the prohibition office; that he conferred with Mr. Chidester. [19]

TESTIMONY OF FRANK SEKINOFF, FOR PLAINTIFF.

FRANK SEKINOFF testified: That I know Peter Sekinoff; that he is a relation of mine; that I have lived with him; that we lived about a year or a year and a half together, 1929 and 1928; that in 1929 we lived at the Martin Apartments; that in 1929, November, I quit living with him and went to the Westward, I was working in the A. J.; that I left Juneau about the 12th of November; that we lived in the same room; that I saw him every day; that he had trouble with his right eye and was always going up to the doctor; that there seemed to be some kind of white stuff in his eye when I looked, sometimes; that was the right eye; that I never

(Testimony of Frank Sekinoff.)

looked in his left eye; that there was nothing wrong with his left eye; that I saw him again in 1930; that when I came back from La Touche in September, he came back from Ketchikan and we met in front of Behrends, I looked at him and saw there was something wrong with his eye, I asked him what was wrong with his eye but he didn't say anything, so I went to the postoffice and came back and then he told me— (Don't tell what he told you); that that was the left eye.

Cross-examination.

That Pete is my brother.

Redirect Examination.

Mr. HELLENTHAL.—That is all. [20]

TESTIMONY OF FRED HURLHREN, FOR PLAINTIFF.

FRED HURLHREN testified: that I am Fred Hurlhren; that I know the plaintiff, Peter Sekinoff; that I have known him close to two years; that we were working in the Alaska Juneau; that I was shift boss in the Alaska Juneau; that I was pretty well acquainted with him; that I knew him in the fall of 1929; that there was nothing wrong with his left eye during that time; that I left Juneau until February, 1930; that I saw Peter every once in a while between January first and the time I left; that I don't remember the last time I saw him, I don't think I saw him after the first of January; that

(Testimony of Fred Hurlhren.)

when I left in February, 1930, I went to LaTouche; that the next time I saw Pete it was the first of December, this fall; that I met him on the street; that I noticed right away there was something wrong with his left eye; that it was not there before. (The COURT.—When did you see him? First part of December. December of which year? Nineteen thirty.)

Cross-examination.

That I don't know what was wrong with his left eye; that I just saw there was something wrong with the left eye; that I could tell from meeting him on the street; that I see nothing wrong with your left eye; that you can see out of your eye pretty well. [21]

Whereupon the defendant offered the following sworn testimony:

DEPOSITION OF R. M. CURTIS, FOR DEFENDANT.

R. C. CURTIS, by deposition, testified: That I am Roy M. Curtis; that I am Superintendent of the N. P. Severin Company; that they are engaged in the construction of the Capitol Building; that the N. P. Severin Company did at one time employ Peter Sekinoff; that was some time in January, I believe; of this year; that the nature of his employment was laborer; that he never informed me at any time while in my employ that he was injured; that he never applied to me for medical attention; that the

(Deposition of R. M. Curtis.)

first intimation I had of his claim of injury was when we got notice of his filing a suit for damages, when they served the papers on me.

Cross-examination.

That I never designated a doctor for him to go to; that I don't think that was ever done by anyone and have no knowledge of that kind being done.

It is subscribed and sworn to. We will offer this deposition in evidence.

The COURT.—It is admitted. [22]

TESTIMONY OF LOUIS DELEBECQUE, FOR DEFENDANT (RECALLED).

LOUIS DELEBECQUE testified: That I have testified that I was timekeeper and bookkeeper for the N. P. Severin Company; that Mr. Curtis was superintendent in January, 1930; that on the 14th of January, Peter Sekinoff did not complain to me that he was injured while in the employ of the company; that the first intimation I had of any claim on the part of Mr. Sekinoff was when he came in with Dawes' note; that I don't remember exactly when that was; that approximately it was a month or two after he quit work there; that he quit work on January 14th, I believe; that the first indication I had was when he came in with Dawes' note; that I returned the note to him and told him to see Dr. Pigg; that I did not keep the note; that he never, prior to that time, applied to me for medical attention; that we always sent our men to Dr. Pigg;

(Testimony of Louis Delebecque.)

that Dr. Pigg was our doctor from the start of the job until he took his son to the states; that he took his son down there about six months ago, I don't know exactly.

Cross-examination.

That after Dr. Pigg took his son below some of our cases went to Dr. DeVighne, most of them went to Dr. Council. [23]

TESTIMONY OF DR. W. W. COUNCIL, FOR DEFENDANT.

Dr. W. W. COUNCIL testified: That I am W. W. Council; that I am a physician and surgeon; that I have been such for twenty-five and one-half years; that I graduated from the University of Virginia; that ever since I finished my hospital service, nineteen six, I began to practice and have practiced ever since; that my practice is general; that I do some practice that includes disease of the eye; that I am both physician and surgeon; that I know the plaintiff, Peter Sekinoff; that I did examine his eye, I believe in April of last year; that I believe it was at that time that he consulted me as a physician; that he had a cataract; that the cataract was on his left eye and was pretty well advanced; that I may have examined the plaintiff since that time, but I don't remember; that perhaps two days after Thanksgiving I did examine the plaintiff; that it was possibly November, 1929, my note would show it if I did, but I have no independent recollection

(Testimony of Dr. W. W. Council.)

of the same; that I could not tell from my examination what caused the cataract; that if the injury took place on the 14th of January, 1930, in order for a cataract to develop that early he would have had to have a rupture of the capsule of the lens, that is, he would have had to have a blow severe enough or hard enough to rupture the capsule of the lens or puncture the lens; that I saw no scars; that a cataract can be removed; that it is a comparatively simple operation when it is ready; it is a delicate operation, of course, but there is very little reason to fear; that this is the lens of the eye (indicating on the chart throughout), what is called the crystalline lens; this has the power of changing its shape and thereby focusing the light rays which pass through coming in and focus them on the retina back here; that is your image [24] of whatever the light rays come from; well, this is perfectly clear, and it has these little muscles attached to here for the power of accommodation or changing its shape. Well, a cataract is simply a clouding up of this lens, so that the light rays don't pass through, and usually is a gradual process unless this capsule is ruptured allowing it to change the composition and cloud up rapidly. Mr. GRIGSBY: Object is immaterial in this case as to what you do in order to restore vision. It is immaterial whether or not an operation could remedy the situation or not; the law is plaintiff is under no obligation to have an operation performed, and his present condition is the vital point in the case. The Court

(Testimony of Dr. W. W. Council.)

overruled the objection. (Last question read.) That you wouldn't do anything to restore vision; you would already have vision; you would—you could see at a distance fairly well, but you would have to have in looking at closer objects, you would have to have a lens outside the eye, that is a glass lens, similar to this convex lens, to focus the rays on the retina; that you would get fairly good vision that way; that there are a good many different kinds of cataract; that the most common is traumatic cataract; so called from blows or injury, and senile cataract; senile cataract is simply a slow development, the lens kind of clouding, in old people; that this generally occurs from sixty on up; that it may occur from forty on; that a senile cataract is called a common cataract; that diabetes cataract occurs sometimes in persons suffering from diabetes; that when you have an injury to the eye a cataract is caused by rupture to the capsule; the lens is in the capsule, a layer of tough tissues holding the lens in place, and there is a rupture of the capsule allowing other matters of the eye—the acreous liquid to penetrate the lens; that in order to have traumatic cataract the blow would have to be severe, or a piercing wound, which would penetrate the [25] capsule; that I didn't see any scars; that I cannot call to mind having made an examination of this man November 29th, in the presence of Mr. Hellenthal and Mr. Faulkner.

Cross-examination.

That the injury to the eye was simply a clouding

(Testimony of Dr. W. W. Council.)

of the lens; that the operation you make on it is the removal of the lens; that this natural lens focuses the light rays; that it does so by adjusting its shape; that if this is removed you have to replace the natural lens with a glass lens; that you probably would have to have different glasses for each distance—in a person who has begun to wear glasses in old age that hardens up and doesn't adjust itself rapidly, and that is why we have to have different glasses; that in a man of forty or fifty, if he has the lens removed, he would have to have at least two glasses in order to co-ordinate with the other eye; that he would have to have one for reading and one for distance; that in order to co-ordinate you would have to have another glass; that nearer than that he would have to have two; that the natural lens adjusts itself to every distance, up to a certain age. Even after that age you have to correct it—you have to do that with glasses which you ordinarily do with two pairs of glasses; that your lenses changes in shape but very slowly; that I don't think that it would be out of focus with the two eyes, nor that the sight he gets with one eye would interfere with the sight he gets through an artificial lens; that if the lens were exactly focused for that distance it would be all right; that if they were not focused thus, he would be seeing with each eye individually; that a great many people who have perfect sight in both eyes only use one eye, that is, they see everything with one eye; that if the lens were not properly adjusted he would

(Testimony of Dr. W. W. Council.)

see with only one eye; that it would be distorted if he had a lens if it distorted the rays; that if you had a perfect lens at ten feet there would [26] not be very much distortion, at twenty feet, nor at a distance of thirty feet, twenty feet is the regular distance for fitting glasses for long distance vision, and after that it doesn't make any difference; that if these glasses are fitted for a person with the lens in natural condition that natural condition of that lens helps to focus, even with the glasses; that if the lens is taken out it can't help that focussing any more; that there would be use for the man's eye provided he lost the other eye; that he would only have this eye he could see with; that there would be no distortion; that it is possible as long as he has a good eye they are more or less at variance, but I have perfectly good eyes and only use my right eye; that the vision isn't just as clear in it; there is nothing wrong with my eye; but at the same time, if I close my right eye I can't read or anything with my left eye unless I use a glass, an occulist told me it was because I didn't use that eye; that I adjusted myself to that condition; that I was born with it; that a person thirty or forty years old has already adjusted himself, if he were born in that condition; he isn't seeing at all out of that eye. [27]

TESTIMONY OF DR. W. J. PIGG, FOR DEFENDANT.

Dr. W. J. PIGG testified: That I am W. J. Pigg; that I am a physician; that I have been practicing since 1904; that I graduated from the University Medical College, Kansas City, Missouri, and have been practicing continuously since; that I have practiced in Juneau since 1922; that my practice includes minor treatment of the eye; that I know Peter Sekinoff; that I have known him since they built the Cold Storage; that I don't know what year that was; that in the year they built the Cold Storage I treated his eyes; that I treated both eyes; that he had trouble with both eyes at that time; that I have treated him, you might say, continuously all the time he was in town; that I have treated him since the year the Cold Storage Plant was built and up to a few months ago; that during that time he worked for the Alaska Juneau Mining Company; that I don't know what years he worked there but it was after the Cold Storage plant was built; that I treated him when he worked for the Alaska Juneau Company, treated his eyes; that I treated both eyes; that he had a cataract in one eye, I don't know which one and had some weakness in the other eye, I couldn't tell just exactly what it was; that he had a cataract coming when I treated him when he worked for the Cold Storage plant; that in 1930, January, I had occasion to treat him; that he came to me—he said a few days prior to that I think it was, that he got some sand in his eye; the

(Testimony of Dr. W. J. Pigg.)

boss took it out, and he said he lost his job; he wanted me to help him get his job back, he did not say why he lost his job; that I think I know why he lost it; that at that time I examined his eyes; that there was nothing different about the eye from what I had seen before; that I examined it well; that he had a cataract on it then; that he wanted me to help him get his job back, and when he couldn't he wanted me to help; that he offered me fifty dollars to swear—if it came to [28] court—to say I never treated his eyes at all. I told him that that wasn't enough, so he offered me a hundred dollars and I told him that was just about enough to send him back to the penitentiary; that in January, 1930, is when he claimed he got hurt; that when he was working for the Alaska Juneau Company he wanted me to get the company to send him out to get his eyes treated, I don't remember what year that was but it was before the construction of the Capitol Building; that I have no history of this case; that I do not keep record of such cases as that, because he was always working for a company; that because he was working for a company, and they gave me an order and I send in a bill; that it isn't necessary to keep a record when he was working for a company; that I did not keep a record of the case when he came to me in January this year and said he got hurt at the public building; that I can't say for certain whether he came to me for two months after that but he came practically every day; that it was during the last trip he made that he offered me fifty dollars; that he said, "I give

(Testimony of Dr. W. J. Pigg.)

you money you say you never treated my eyes." I said, "Say where, Pete?" He said, "To the Court House to the Judge." I said, "That isn't enough." He said, "I give you a hundred dollars cash money" that is if I said I never treated either eye; that I treated both eyes previous to that time; that I talked to Mr. Hellenthal and Mr. Grigsby about 10 o'clock yesterday morning; that I treated both his eyes; that I didn't say I couldn't remember which one it was, you asked which eye had a cataract, I didn't know which one; that I did not say that I could not remember which eye I treated; that I could not swear to which eye the cataract is on; that when I saw him in January I don't know which eye had the cataract; that the cataract was very visible in January and practically developed; that while he was working for the Alaska Juneau and during my previous treatment of him he had a [29] *a* cataract in one eye which was barely discernable; that I did not say barely discernable; that I do not mean to tell the jury that the cataract was practically in the same condition in January as it was when he worked for the Alaska Juneau; that it is some more developed then when he worked for the Alaska Juneau; that I do not know which eye was troubling him when he worked for the Alaska Juneau; that there was trouble with both his eyes; that he had a cataract on one eye; I had a suspicion he was going to have one on the other, he complained of it; that I did not see one on the other eye; that he came so often and I cleaned it out with a little lysol solution; that was

(Testimony of Dr. W. J. Pigg.)

when I treated him and any time he came; that he came to the office and said—about as near as I can get it—he says, "I want you to help me get money; you say nothing to the court—court Judge—about my eyes you didn't see my eyes"—to that effect anyhow; that I might not be able to repeat the words he used, word for word; that he said he would give me fifty dollars; that I might not use exactly the same words that he used; that he offered me a bribe to testify falsely; that is what I know; that he said, "I will give you fifty dollars cash money"; that when he was working for the Alaska Juneau he claimed he got something in his eye up there; that he asked me if I would use my influence to get the company to send him outside to get his eye fixed; that he did not offer me a bribe then; that I am not necessarily the company's physician; I have had something to do for them in other matters; that until I went out I think they did send all their patients to me. That I am not the doctor for the mining company at this time; that I have no relation whatever with the Severin Company; that I have no one under treatment for the company at all. [30]

TESTIMONY OF DR. R. E. SOUTHWELL, FOR DEFENDANT.

Dr. R. E. SOUTHWELL testified: That I am Dr. R. E. Southwell; that I am an optometrist; that I graduated from the Los Angeles School of Optometry; that I practitice in the Valentine Build-

(Testimony of Dr. R. E. Southwell.)

ing, Juneau, Alaska, as an eye specialist; that I have been here two years; that I know the plaintiff since Monday night; that I met him Monday night at my office; that I made an examination; that Mr. Hellenthal and Mr. Faulkner were present at the time; that I examined the left eye at that time; that the condition of the eye was a cataract nearly ready for operation; that there was no evidence of an injury there; that there are many different kinds of cataract, the most simple kind in the eye is traumatic, senile, diabetes, epthritis; that traumatic cataract is due to an injury; that the cause of traumatic cataract is by electric shock or lightening storm or something that will pierce the capsule of the lens, letting the acreous humor be absorbed by the lens; that cause is allowing the acreous humor to get into the lens; that in order to do that you must have a rupture or piercing of the capsule, some place through here (shows on chart); that it would take a very hard blow to cause traumatic cataract, or a piece of steel get in there; that it would leave a scar on the cornea; that the cornea is here (indicating on chart); that there was no evidence of any scar or puncture in the man's eye; that it would not be sufficient to cause a cataract to the eye, in the stage of development it was Monday, by being hit with some foreign substance in his left eye; that it takes a period of years in most cases to develop a cataract; that would not, in my opinion, cause a cataract at all; that it would take a real severe blow; that in that case there should be evidence of the injury on the cornea of the eye;

(Testimony of Dr. R. E. Southwell.)

that senile cataracts show in the fiftieth year mostly, ready for operation, in the fiftieth year, sometimes as early as forty; [31] that they show from between forty and fifty on up; that a cataract could be removed and it isn't very serious; that when the cataract is removed you can get vision by an optic lens, a powerful crystalline lens that takes the place of the natural lens; that I am not a physician; that measuring for lens; optometry; to measure the eyesight by lenses, and treat by lenses, and renew vision, and so on; that I do not perform operations for cataract; that this is not in my line of work; that I measure the eyesight; that I correct the trouble in the eye; that in this case if this cataract were removed then there would have to be an artificial lens placed in place of this natural lens; that the natural lens would be removed by the operation of removing the cataract; that the natural lens accommodates itself to distance; that artificial lenses do not accommodate themselves to distance by themselves; than an artificial lens cannot accommodate itself; that the iris of the eye regulates the light; that it also accommodates distance to certain extent; that it would not be difficult to use an artificial lens and a natural lens together; that if the lens were adjusted at a certain distance, which would be twenty feet, that takes care of farther; that if you come to ten feet the vision would be clearer with the artificial lens; that if you bring it within three feet the vision would be poor; that there is a change between three feet and ten feet; that you could see between three

(Testimony of Dr. R. E. Southwell.)

and ten feet but the change starts at three feet; that the vision would be getting better and better from three feet off; that it would be better at ten than three in the artificial lens, it would also be so in the natural lens; that it would be better after you got farther away; that the other eye, the natural eye, is in good shape, is of value after an operation for the removal of the cataract and that the artificial lens placed in the eye; that you can take and close the good eye, the artificial lens, cataract lens, and have practically [32] normal vision if the retina or optic nerves are not affected; that the two eyes would not co-ordinate perfectly; that there is always a little lack of co-ordination; that that is more so as you grow older; that between the natural lens and artificial lens there is some difference; that I do not treat an injury to the eye at all, I recommend physicians. That the natural tendency of a person's eye, who has to wear glasses, as they grow older, is that they don't co-ordinate; that is the reason glasses have to be adjusted; that the eyes are nearly all different in most cases; that one eye will see better than the other. [33]

TESTIMONY OF HECTOR McLEAN, FOR DEFENDANT.

HECTOR McLEAN testified: That I am Hector McLean; that I am employment agent, Alaska Juneau Gold Mining Company; that I have been such agent since 1916; that I know the plaintiff Peter Sekinoff; that I have known him during the past

(Testimony of Hector McLean.)

four or five years; that he was employed by the Alaskan Juneau Company; that he was employed there in 1928 and 1929; I think he worked there in 1927 too; that he is about fifty-four years old; that I got that from his employment card; that I was one time at Doctor Pigg's office and he was there; that there was something wrong with his eye and Dr. Pigg was treating him; I don't know what was wrong with it; that was in nineteen twenty-nine; that the cold storage plant was built in nineteen twenty-seven. [34]

TESTIMONY OF DR. R. E. SOUTHWELL, FOR DEFENDANT (RECALLED).

Dr. R. E. SOUTHWELL again testified: That I have sworn that I examined the plaintiff's eye, and I examined his right eye; that I found a starting cataract in his right eye; that the cataract is about three years old; that it is pretty hard to say how old the cataract on his right eye is; that the cataract commenced to develop some time before it is visible and diminution of vision; that it might be some years before you know it; that if the plaintiff were injured in his left eye in 1930, in my opinion it could not possibly cause a cataract in the other eye. [35]

TESTIMONY OF PETER SEKINOFF, FOR DEFENDANT (RECALLED).

PETER SEKINOFF testified: That I have heard Dr. Pigg's testimony about my offering him

(Testimony of Peter Sekinoff.)

fifty dollars; that I never told him anything; they sent me from office, from superintendent; I came down and he asked me where I work, I said, "Capitol Building"; that I said nothing about paying him something for saying something; that I told Dr. Pigg what was wrong, and he gave me a prescription; that was the talk at the time he gave me the prescription; that is the time he gave me the prescription. He told me my eyes were all right, and go to the drugstore and get some medicine for my eyes and they are all right now; that I told him to keep on caring for my eye and I would pay him something; that I did not tell him how much I would pay him; that I did not say anything about fifty or one hundred dollars; that I asked him how much he was going to charge, he told me he could do nothing, that I could do it myself; that is the time he gave me the prescription (Mr. Hellenthal offered prescription as evidence, marked Exhibit "A" for Defendant). (Mr. Hellenthal shows prescription to the jury, marked Exhibit "A" and dated March 1st, 1930.) That that is the last time I went to Dr. Pigg's; that at one time Mr. Chidester wanted to get me a job on a boat but the wages being only $70.00 I said it was too cheap. One time I reported a man and this got him into trouble with Chidester; that I do not remember how much he gave me, I forgot; that I see Chidester for my eye, and tell him about it, that is all, several times I have met him on the street and spoken to him; that I was in the prohibition office and talked to him one time; that I was never on the Government

(Testimony of Peter Sekinoff.)

pay-roll; that I never got a regular salary from him for a week or a day or a month; that Dr. Pigg only treated one eye, the right eye; that sometimes he made a mistake and put stuff in my left eye instead of the right eye; [36] that because I did not understand what you told me, look like you tried to find out if I worked when I never tried to work; that I have been in this country for twenty years; that I never worked last summer for Chidester or the prohibition office; that I never did work for the prohibition office; that if Mr. Church says I did it is not true; that one time I see one fellow and reported him that is all I know; that Ralph Beistline did not fire me down at the Alaska Juneau because I was working for the prohibition office; that that is not true; that the boss at the Capitol Building did not fire me because I was doing some work for the prohibition office, I was not fired; that I never did work for the prohibition office or Chidester; that I just know him just speak to him sometimes, something like that is all; that I was in his office for him to see my eye; that is what I was up *therefore*; that Chidester asked me about my eye; that he asked me in his office, that I just went up to his office; that I know him for a long time and always speak to him just as a friend, but had no business with him, because he is a prohibition officer it makes no difference to me; that I know Harry Sokoloff; that Harry Sokoloff and I never did work for the prohibition office; that I never had any trouble with Sokoloff over at the prohibition office; that I don't know how long Chi-

(Testimony of Peter Sekinoff.)

dester has been in Ketchikan; that I don't know how long Mr. Chidester has been there; that last summer I worked in the sawmill in Ketchikan; that I came back to Juneau in the fall; that I have been traveling around a good deal in order to find some work and to get rich; that I never was in Petersburg; that I came here in November from Ketchikan; that after that I stayed in this town; that I did not go to Sitka; that I don't remember going to the prohibition office on the 20th day of January, when Chidester wasn't here; that I forgot whether I went up to the prohibition office on the 20th of January; that I don't remember going up to the prohibition office since coming [37] back from Ketchikan; that maybe I wanted to find out if Chidester got back from below yet; that I did not go up there quite frequently; that I was never employed by the prohibition office; that I never told Dr. Pigg I would give him money, for him just to fix my eye because I did not want to be blind; that Dr. Pigg didn't tell the truth when he said I wanted him to come up here and testify that he never treated me; that I didn't offer him fifty dollars or a hundred dollars; that I did not want him at one time to give me a certificate to the Alaska Juneau and get compensation; that is all false; that you, Mr. Hellenthal, sent me to the prohibition office to find out whether Mr. Chidester was in town; that you sent me a couple times, I guess. [38]

TESTIMONY OF T. L. CHIDESTER, FOR DEFENDANT (RECALLED).

Mr. T. L. CHIDESTER again testified: That the plaintiff was never employed by the Bureau of Prohibition as an employee. I gave him money on two or three occasions. He used to come up and give me information occasionally; that he gave me information a few times and I gave him some money; that is the only employment that ever existed between the plaintiff and me; that I never did employ him at Ketchikan; that it has all been in Juneau; that there was no regular employment; that he gave me information two or three times and I gave him something for it; that that was just for giving me the information.

Cross-examination.

That the money I gave the plaintiff was not Government money; that I did that myself; that I have known him about four years; that in return for the information he gave me, I gave him money out of my own pocket; that I have no way in getting that back from the Government; that that is purely a personal matter; that that is the only connection he had with the prohibition office; that we have a provision where we can employ funds for that purpose; that I did not do that with him; that he used to come up to the office quite frequently and talk to Mr. Church; that I haven't been here much last year; he was up last December when I was here, and also January; that it was between him and

Sokoloff that they had trouble, I believe; that they were both just giving me information at that time. [39]

Whereupon the evidence being all in, the defendant made the following motion:

Come now the defendants and move the court to direct the jury to find herein a verdict in favor of defendants. This motion is made upon the following grounds, to wit:

First: That there iis no evidence in this cause of any decrease of earning capacity of the plaintiff.

Second: That there is no evidence in this cause that the plaintiff suffered the total loss of his left eye within the meaning of the Workman's Compensation Act of Alaska, referred to in the complaint. [40]

(After extended argument by counsel on both sides, the following occurred:)

The COURT.—I am of the opinion that it will be necessary to direct a verdict in this case, for the defendant. It seems to me counsel has laid his complaint on loss of earning capacity, and as I view it there *it is* a total failure to show any loss of earning capacity whatever.

In the first place to show loss of earning capacity you have to show there is an earning capacity that was lost. It (the evidence) doesn't show whether his sight was good before, or whether he wore glasses. But earning capacity also depends on other things than sight of an eye. His general physical condition—there is nothing to show his general physical condition, unless we assume the

fact he worked on this building for the periods he specified he worked, would show it; nothing to show he was healthy or not, or anything about him; no basis of comparison; nothing to show he had anything to lose; nothing to show he had any earning capacity; and further than that there is no per cent shown. All the jury could do in the matter of earning capacity would be to go out and guess. There is nothing which shows what per cent he has lost, in any way. I checked the evidence up carefully yesterday and I can see nothing a jury could do but guess at the loss of earning capacity. This man wouldn't be denied the case going to the jury if he had shown any such evidence.

Now you come in here and claim there is also an allegation of loss of an eye. I am of the opinion that the showing of the cataract does not constitute that permanent [41] and total loss of the eye that would have to be shown to entitle him to recover under the Alaska statute without basing it on earning capacity. I do not think the showing that a cataract formed as a result of an injury is sufficient. The burden, it seems to me, is on the plaintiff to show the complete permanent total loss, and when he shows a cataract I don't think he has shown that, regardless of the Illinois case (cited during argument). All the doctors who testified have stated that a cataract is operatable; that there is a considerable use of the eye after the operation is performed. It seems to me the burden is on him to show total, permanent disability under this pleading.

So I can't see that he proved a case. If he had come in and proved loss of earning capacity there is no question but that the case would have to go to the jury on that; but I can't see how the jury could do more than go out and speculate, because there is no earning capacity shown in the case whatever.

Call the jury.

(The jury returned and took its place in the jury-box.)

The COURT.—Ladies and Gentlemen of the Jury: Motion has been made in this case for me to direct a verdict on behalf of the defendant. I feel under the evidence in this case that there is a total lack of evidence sufficient to sustain a finding by a jury for the plaintiff. It is my duty to direct you to return a verdict in this case for the defendant. You will therefore retire.

Mr. GRIGSBY.—I take an exception, if your Honor please.

The COURT.—Exception allowed. [42]

Mr. HELLENTHAL.—Will the Court again note an exception to the receiving of the verdict?

The COURT.—Exception will be noted.

The verdict will be received and filed.

Thereupon the case was closed and the jury excused. [43]

CERTIFICATE OF JUDGE TO STATEMENT OF EVIDENCE.

United States of America,
Territory of Alaska,—ss.

I, Justin W. Harding, Judge of the District

Court for the First Division, Territory of Alaska, hereby certify that the foregoing statement of evidence and proceeding had is a full statement of the evidence and the proceedings had in the above-entitled cause, except Exhibits "A" and "F," and further certify that the original statement herein was filed with the Court on the 9th day of March, 1931.

Allowed this 23d day of March, 1931, in duplicate, one of said duplicate originals to be forwarded to the Circuit Court of Appeals.

JUSTIN W. HARDING,
District Judge.

O. K.—H. L. FAULKNER.
Attorney for Defendant. [44]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 3064–A.

PETER SEKINOFF,

Plaintiff,

vs.

N. P. SEVERIN CO., a Partnership of Which N. P. SEVERIN and A. N. SEVERIN are Members,

Defendant.

JUDGMENT.

This cause came on regularly to be heard on February 11, 1931, before the Court and a jury, and

both parties announced ready for trial (the said jury having been duly selected, empaneled and sworn), and the said jury having heard the evidence, and having been, on February 13, 1931, instructed by the Court to return a verdict for the defendant, returned into court the following verdict, to wit:

"In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 3064–A.

PETER SEKINOFF,

Plaintiff,

vs.

N. P. SEVERIN COMPANY,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find for the defendant.

JOHN B. GODFREY,
Foreman."

It is therefore considered by the court, and IT IS ORDERED AND ADJUDGED, that the plaintiff take nothing by his action herein; that the defendant go hence without delay, and that the defendant have and recover of and from the plaintiff their costs and disbursements herein to be taxed by the Clerk, for which let execution issue. [45]

Done in open court this 7th day of March, 1931.
Exceptions allowed plaintiff.

JUSTIN W. HARDING,
Judge.

Copy received Mch. 7, 1931.

H. & H.

Filed March 7, 1931. [46]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR.

Comes now the plaintiff appellant and with his petition for appeal, presents this, his assignment of error and assigns the following error, upon which he will rely for reversal;

I.

The Court erred in allowing the defendant's motion for a directed verdict and directing the verdict herein and entering judgment on said directed verdict.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff-Appellant.

Copy received and service admitted this 7th day of March, 1931.

H. L. FAULKNER,
Attorney for Defendant.

Filed Mar. 31, 1931. [47]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable JUSTIN W. HARDING, Judge of the District Court for the Territory of Alaska, Division Number One at Juneau:

Comes now the above-named plaintiff, Peter Sekinoff, by his attorneys, Hellenthal & Hellenthal and complains that the court erred in directing a verdict for the defendant, and also in the rendition of the judgment in the above-entitled cause, which said judgment was dated the 7th day of March, 1931; that manifest error hath happened to the great damage of the plaintiff, as will more fully appear from the assignment of error filed herewith.

WHEREFORE the plaintiff prays that an appeal be allowed him; that a citation may issue and a transcript of the record be sent to the Appellate Court and for an order fixing the amount of the cost bond in this cause and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 7th day of March, 1931.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff and Appellant.

The above petition and appeal is allowed, and the cost bond fixed at $100.00.

Dated this —— day of March, 1931.

JUSTIN W. HARDING,
District Judge.

Copy received Mch. 7th, 1931.

H. L. FAULKNER,
Attorney for Defendant.

Filed Mar. 7, 1931. [48]

[Title of Court and Cause.]

APPEAL.

The President of the United States, to the Honorable JUSTIN W. HARDING, Judge of the District Court for the District of Alaska, Division Number One, at Juneau, GREETING:

Because of the record and proceedings and also in the rendition of the judgment in said District Court before you, in the above-entitled cause, manifest error hath happened to the great prejudice and damage of the plaintiff, as is stated and appears in the petition herein,—

We being willing that error, if any hath happened should be duly corrected and full and speedy justice be done to the parties in this behalf, do command you, if the judgment herein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, together with this writ so that you have the same before the court on or before thirty days from the date hereof that the records and proceedings aforesaid, being inspected, the Circuit Court of Appeals may cause further to

be done therein to correct those errors that of right and according to the laws and customs of the United States ought or should be done. [49]

WITNESS the Honorable CHARLES E. HUGHES, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Juneau this 9th day of March 1931.

JOHN H. DUNN,
Clerk.
By J. W. Leivers,
Deputy.

Copy received and service admitted this 7th day of March, 1931.

H. L. FAULKNER,
Attorney for Defendant.

Filed Mar. 9, 1931. [50]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Peter Sekinoff, plaintiff and principal, and L. Kann and C. H. Helgesen, of Juneau, Alaska, as sureties, are held and firmly bound unto the defendant, N. P. Severin Company, in the penal sum of $100, for which payment, well and truly to be paid, we bind ourselves and each of us, and our heirs, executors, administrators, and successors, jointly and severally firmly by these presents.

The condition of the above obligation is such that whereas the above-named principal is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a judgment in the above-entitled court, rendered and entered in the District Court for the District of Alaska at Juneau, Alaska, on March 7th, 1931.

NOW THEREFORE, if the said plaintiff shall prosecute said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

Signed and sealed this 7th day of March, 1931, at Juneau, Alaska.

PETE SEKINOFF,
Principal. [51]
L. KANN,
C. H. HELGESEN,
Sureties.

Taken and acknowledged before me this 7th day of March, 1931.

[Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My comm. expires 1/22/34.

Filed Mar. 9, 1931. [52]

United States of America,
Territory of Alaska,—ss.

We, the undersigned, L. Kann and C. H. Helgesen, whose names are signed to the foregoing bond, being first duly sworn, depose and say: That we are residents of Juneau, Alaska, and not counselors

at law, nor attorneys, marshals, deputy marshals, Clerks of any court, nor other officers of any court, and are qualified to give bail; and that together we are worth the sum of $200.00 over and above all just debts and liabilities, exclusive of property exempt from execution.

L. KANN,
C. H. HELGESEN.

Subscribed and sworn to before me this 7th day of March 1931.

[Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My comm. expires 1/22/34.

Approved this 9th day of March, 1931.

JUSTIN W. HARDING,
District Judge.

Copy received March 7th, 1931.

_____,
Attorney for Defendant.

Filed Mar. 9, 1931. [53]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America.

The President of the United States of America, to the Defendant N. P. Severin Company:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Ap-

peals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the District Court for the District of Alaska, Division Number One, at Juneau, wherein Peter Sekinoff is plaintiff and appellant and N. P. Severin Company is defendant and appellee, then and there to show cause, if any there be, why said judgment in said cause, and in said appeal mentioned, should not be corrected and speedy justice done in that behalf.

WITNESS the Honorable CHARLES E. HUGHES, Chief Justice of the United States this 9th day of March, 1931.

JUSTIN W. HARDING,
District Judge.

Attest: JOHN H. DUNN,
Clerk.
By J. W. Leivers,
Deputy.

Service of the foregoing admitted this 7th day of March, 1931.

H. L. FAULKNER,
Attorney for Defendant.

Filed Mar. 9, 1931. [54]

Filed Mar. 9, 1931.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Will you please make up a transcript of the record in the above-entitled cause, and include therein the following papers, to wit:

1. Complaint.
2. Answer.
3. Duplicate original bill of exceptions, called statement of facts.
4. Judgment.
5. Assignment of error.
6. Petition for appeal and order allowing appeal.
7. Appeal.
8. Cost bond on appeal.
9. Citation.
10. This praecipe.

Clerk's certificate.

—said transcript to be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and please forward the same to the Clerk of the said Circuit Court of Appeals for the Nineth Circuit, in accordance with said rules.

Dated at Juneau, Alaska, this 7th day of March, 1931.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

Copy received Mch. 7, 1931.

H. L. FAULKNER,
Attorney for Plaintiff. [55]

[Title of Court.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached fifty-six pages of typewritten matter, numbered from 1 to 56, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for appellant on file in my office and made a part hereof in cause No. 3064–A, wherein Peter Sekinoff is plaintiff and appellant and the N. P. Severin Company is defendant and appellee.

I further certify that the said record is in accordance with an appeal, citation issued and praecipe in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to the sum of Nineteen and 55/100 Dollars ($19.55) has been paid by counsel for the appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 11th day of April, 1931.

[Seal] JOHN H. DUNN,
Clerk.
By J. W. Leivers,
Deputy. [56]

[Endorsed]: No. 6439. United States Circuit Court of Appeals for the Ninth Circuit. Peter Sekinoff, Appellant, vs. N. P. Severin Company, a Partnership of Which N. P. Severin and A. N. Severin are Members, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One.

Filed April 18, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

NO. 6439

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER SEKINOFF,

Appellant,

vs.

N. P. SEVERIN COMPANY, a partnership of which N. P. SEVERIN and A. N. SEVERIN are members,

Appellees.

Appellant's Brief

J. A. HELLENTHAL,
SIMON HELLENTHAL,
Attorneys for Appellant.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETER SEKINOFF, *Appellant,* vs. N. P. SEVERIN COMPANY, a partnership of which N. P. SEVERIN and A. N. SEVERIN are members, *Appellees.*	NO. 6439.

STATEMENT OF FACTS

This action was brought by the appellant, plaintiff in the lower court, under the workmen's compensation act of Alaska. In the complaint he alleges, as far as material, that on or about the 14th day of January, 1930, in the course of his employment, he accidentally received a personal injury while shoveling dirt; in that he was hit with some foreign substance in his left eye, by which he was permanently injured, which injury has resulted in the total loss of the sight of his left eye; and that by reason of the loss of his left eye, his right eye was irritated and strained; and that by reason of said injury, the plaintiff's earning capacity has been reduced to the extent of fifty per cent; that

he is single, without dependents, and prays for damages (Record, pages 2 and 3). The answer admits the employment and that the plaintiff was single, without dependents, but denies the injury (Record, page 5).

Upon the trial, evidence was adduced showing that while the appellant was working for the appellee, on or about the 14th day of January, 1930, while he was working with pick and shovel, something hit him in his left eye; that the shifter, Carney by name, was behind him and helped him clean the dirt out of his eye (Record, page 8); that about two days later, the same shifter took him to the superintendent's office, and then they sent him to the company's doctor, Dr. Pigg (Record, pages 8, 10 and 12).

That before this time he had worked as a laborer and miner and had never had any trouble with his left eye (Record, pages 8, 9, and 12) and had fairly good vision (Record, page 9), but had had some trouble with his right eye (Record, page 9); that he continued treatment with Dr. Pigg for some two (2) months until he was discharged by Dr. Pigg (Record, pages 10, 11 and 37), at which time he was given a prescription, told to get it filled, and to apply the medicine to his eye himself and then he would be all right (Record, pages 10, 11 and 37).

That on the same day that he was discharged by Dr. Pigg, he was examined by Dr. Council, who told him that an operation on his eye was necessary and that it would cost him $250.00 (Record, page 11). That on or about the same time, he was examined by Dr. Dawes,

who gave him a note, with instructions to take the note to the appellee (Record, pages 11 and 13); which note stated that his eye needed attention (Record, pages 13 and 14). That he took the note to the appellee's bookkeeper but received no satisfaction from him except saying that he did not care for that (Record, page 11).

That the injury to the plaintiff's left eye is a traumatic cataract, which has resulted in the total loss of sight in that eye (Record, pages 9, 13 and 24). That the appellant also has a cataract on his right eye, which was about three (3) years old at the time of the trial (Record, page 36).

That plaintiff, since receiving that injury again applied for work with the defendant company but was told that they had no work for him (Record, page 9); and had also been employed in the saw mill in Ketchikan, but that he was unable to hold his job. That plaintiff's right eye was very tired then (Record, page 9).

Evidence was introduced that the cataract on the appellant's eye could be removed by a surgical operation (Record, page 25), and if the operation was successfully performed, the appellant, with the use of glasses, would have considerable vision in his left eye (Record, page 18); that after the operation he would not be able to see without glasses, and that with glasses, the injured eye would not co-ordinate with the other in that it would not accommodate itself as to distance (Record, pages 18, 28), that the operation of removing a cataract

is comparatively simple but is a delicate operation and there is very little to fear (Record, page 25); that lots of times you are unable to bring the operated eye up to normal and they do not act the same and it creates a certain amount of blurring (Record, page 18).

Thereupon, the defendant moved for a directed verdict on the following grounds: First, that there was no evidence of any decrease of earning capacity; and second, that there was no evidence that plaintiff suffered the total loss of his left eye (Record, page 41). Which motion was granted and the jury instructed to return a verdict for the defendant (Record, page 41).

LAWS OF THE TERRITORY OF ALASKA

Chapter 25, Laws of 1929, "The Workmen's Compensation Act of Alaska."

Section 1 (paragraph near bottom of page 49).

> "Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows:"

(e) (middle page 50)

> "In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother dependent upon him, he shall receive the sum of Five Thousand Four Hundred Dollars ($5,400.00)"

Sec. 1. (near bottom of page 50)

> "Where any such employee receives an injury arising out of, or in the course of his or her employ-

ment, resulting in his or her partial disability, he or she shall be paid in accordance with the following schedule:"

Sec. 1. (middle page 52)

"For the loss of an Eye:"

(a) (middle page 52)

"In case the employee was at the time of the injury unmarried, $2.160.00."

Sec. 1. (paragraph middle of page 53)

"Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars ($7,200.00)."

Sec. 2.

"And in addition to the compensation for injured employees in this act otherwise provided, the employer shall furnish to and for each injured employee such reasonably necessary medical, surgical and hospital treatment, including necessary transportation to and from hospitals, as may be required by reason of the injury——"

ARGUMENT

The only error assigned is that the Court erred in instructing the jury to return a verdict in favor of the defendant.

The argument in this case resolves into two questions.

First: What was the evidence as to plaintiff's decreased earning capacity, and was that evidence sufficient to go to the jury? If this question is answered in the affirmative then the case should be reversed. If, however, the first question is answered in the negative then the second question must be considered, which question is: Was the evidence sufficient for the plaintiff to recover for the loss of his left eye?

The evidence relating to the first question is as follows:

(a) That before the injury the plaintiff worked as a laborer, and miner; that he had a cataract on his right eye about three (3) years old, at the time of the trial (Record, page 36), and had been treated for this by Dr. Pigg, but had never had any trouble with his left eye before the injury, in which eye he had fairly good vision (Record, pages 9, 10 13).

(b) That the plaintiff was injured arising out of and in the course of his employment while working for the defendant, by having some foreign substance hit his left eye (Record, pages 8 and 10); That said

injury resulted in the total loss of sight in his left eye (Record, page 9).

(c) That the plaintiff was refused any further employment by the defendant after the injury (Record page 9).

(d) That the plaintiff worked in a sawmill in Ketchikan after the injury, for a short time, but was unable to hold his job; that his right eye was very tired then (Record, page 9).

We contend that the foregoing was evidence of decreased earning capacity and should have been submitted to the jury to determine the decreased earning capacity of the plaintiff; and that it was error for the Court to take the case from the jury. And further contend that if the jury had found a percentage of decreased earning capacity, the foregoing evidence would be sufficient to sustain a verdict for at least fifty per cent decreased earning capacity.

Consolidated Lead and Zinc Co. vs. State Industrial Insurance Commission, 295 Pac. 210.

In this case, the commission allowed fifty per cent disability. This ruling was questioned in the case on appeal and the Court reviewed the evidence relating to the disability. The case involved the use of a leg, and the doctor testified that he had the loss of use of the leg during that portion of the time the knee locked on him, and that he could not determine the per cent of disability, that that depended upon the pain and so forth. The doctor further said that the injured man might pro-

ceed for several months without any disability, and then if the knee locked he would be unable to use it for perhaps several months. The claimant testified to the pain suffered by him, and that the frequent disability depended upon the use to which he put his leg; that at times during the course of his work when it was necessary to walk on the leg for an extended period of time, he would suffer pain and the knee would swell and he would be forced to quit work until the knee was normal again. The law in the state required that if the injury complained of is of a character as to require skilled and professional men to determine the cause and extent thereof, the question is one of science and must necessarily be proven by the testimony of skilled professional persons. The Court held that the rule did not apply to the case at bar, and that the evidence was sufficient to sustain the finding awarding claimant compensation for fifty per cent loss of the use of his right leg.

In the case at bar the claimant had lost the sight of one eye and had a three-year-old cataract on the other; was refused any further work by the defendant; and could not hold the only job he had since had. In Alaska the recovery is a percentage of a lump sum, and not a percentage of wages previously earned, in this, the Alaska act differs from almost all other compensation acts.

Atlantic Oil Producing Co. vs. Houston, 298 Pac. 245.

In this case there was a total loss of one eye and a

doctor testified to a two per cent loss in the other eye, and the award was fifty-two per cent for five hundred weeks, which was sustained by the Court.

The next question is whether or not the plaintiff, under the evidence and law, could recover for the loss of his eye. Evidence relating to this question is, that the plaintiff in the course of his employment received an injury arising out of his employment, to his left eye. That said injury resulted in a traumatic cataract, which, at the time of the trial, had already covered his left eye and prevented him from having any useful vision in said eye (Record, pages 14 and 24). That the plaintiff had taken treatment from the doctor provided by the defendant company for two months, when he was discharged and told that he should wash his eye himself, and that then he would be all right (Record, pages 10 and 11). That he, on the same day, consulted another physician who told him that an operation was necessary, and that it would cost him $250.00. He, thereupon, consulted a third physician, who gave him a note, which he delivered to the defendant company, requesting the defendant company to give the eye attention, which note was disregarded by the defendant (Record pages 11 and 13).

The lower court based its decision on the ground that a cataract is operatable, and that plaintiff will probably have considerable use of the eye after the operation (Record, page 40) and that therefore the eye was not a total loss.

There is no specific provision of the workmen's compensation act of Alaska, authorizing or requiring an injured employee to submit to an operation. In this regard, the laws of Alaska are similar to Wisconsin and Oklahoma, under which it is held that the rule is that "where a workman unreasonably refuses to undergo a minor operation simple, safe and reasonably certain to effect a cure, the continuing disability results not from the injury, but from his own willful act," and that rule is based upon the theory that "the statutory obligation of the employer to pay compensation during the continuance of the disability is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."

Moran vs. Oklahoma Engineering and Machine and Boiler Co., 214 Pac. 913.

Lesh vs. Illinois Steel Company, 175 N. W. 539; 163 Wis. 124.

This rule includes at least four requirements, first, there must be a refusal to undergo the operation; second, it must be a minor operation simple and safe; third, it must be reasonably certain to effect a cure; fourth, the refusal must be unreasonable.

There must be a refusal. And refusal implies a demand, and we contend that under the facts shown, there was no demand made by the defendant to treat or operate the plaintiff's eye, nor did the plaintiff ever refuse to have his eye treated or operated upon by defendant's physicians. The plaintiff submitted himself for

treatment, was treated by the defendant's physician and discharged and told he would be all right (Record, page 10) and thereafter, through Dr. Dawes, requested treatment from the defendant which the defendant refused to give (Record, page 11). We contend that such a demand and refusal was necessary and the burden to prove the same was on the defendant, and that it was the duty of the defendant to treat the plaintiff for injury received; Sec. 2, Workmen's Compensation Act of Alaska; and that the defendant cannot now take advantage of its own wrong and its refusal to perform a statutory obligation.

Gildersleeve et al. vs. Industrial Commission et al. 295 Pac. 1033

Holds that such a demand and refusal is necessary and that in the case under consideration the evidence does show that there was a recommendation of hospital treatment, by two physicians, who originally attended the employee, but that it was not satisfactorily established, that these recommendations were authorized tenders made on behalf of the insurance carriers or employer; and the Court therefore holds that there was no demand. This case had been previously appealed from an order made by the commission, the Court, on appeal, holding that from the record, it appeared that "no tender of medical or surgical treatment was ever made by either the employer or insurance carrier."

O'Neill vs. Industrial Accident Commission, 266 Pac. 866.

Kingsport Silk Mills vs. Cox, 33 S. W. 2nd 90; 161 Tenn. 470,

Holds that contention that operation would greatly reduce employer's liability cannot be sustained where physicians differ and employer made no legal demand for operation.

The case of Moran vs. Oklahoma Engineering Co. et al., supra, further holds that whether or not the employee has unreasonably refused to submit to an operation is a question of fact, and that the burden of proof was upon the employer to establish all facts as to whether or not refusal to submit to operation and treatment was unreasonable, and they must have established further that the treatment would have relieved the trouble.

Consolidated Lead & Zinc Co. vs. The State Industrial et al., 295 Pac. 210.

In this case the rule stated in the case of Moran vs. Oklahoma Engineering Co. et al., was approved but expressly limited to minor operations, simple, safe and reasonably certain to effect a cure, and approved the rule laid down in Henry vs. Oklahoma Union Railway Co., 197 Pac. 488; 81 Oklahoma 244; holding that the "Industrial Commission has no authority to compel an employe to submit to a major operation where there is a risk of life involved in the slightest degree"; and further cites from the case as follows: "The rule appears to be supported by the overwhelming weight of authority that no man shall be compelled to take a risk of death, however slight, in order that the pecuniary obligations created by law in his favor against his em-

ployer may be minimized," and quotes the rule stated in McNamara vs. Metropolitan State Railway Co., 114 S. W. 50; 133 Mo., app. 645, in which it is said, "We do not think plaintiff should be criticized and punished on account of his failure to undergo a surgical operation. He should be accorded the right to choose between suffering from the disease all his life, or taking the risk of an unsuccessful outcome of a surgical operation. Certainly defendant whose negligence brought the unfortunate condition is in no position to compel plaintiff to again risk his life in order that the damages may be lessened. To give heed to such contention would be to carry to an absurd extreme the rule which requires a person damaged by the wrong of another, to do all that reasonably may be done to mitigate his damages." The Court then considers what is dangerous or serious as compared with a minor, simple and safe operation, and holds that the testimony was that it was highly probable that an operation on the claimant's knee would eventually give claimant one hundred per cent function of the use of said knee, but the doctor who gave the evidence did not go so far as to state that the claimant would get one hundred per cent result, or one hundred per cent function of the knee. The Court further holds that as to whether or not the claimant unreasonably refused to be operated on, is a question of fact, and that the burden of proof was upon the employer. That the employer had failed to sustain this burden by proof that the operation would be "simple, safe and reasonably certain to effect a cure."

Graf vs. National Steel Products Co., 38 S. W. 2nd, 518,

Holds that compensation for injury to the eye was properly based on actual loss of visual efficiency rather than loss of vision when corrected with corrective lenses.

Globe Cotton Oil Mills vs. Industrial Accident Commission, 221 Pac. 658.

Holds that where an injury to a workman necessitated the removal of the lens of an eye in which condition he had but one hundredth vision, having previously lost the sight of his remaining eye, although, with the use of glasses his vision was restored to practically normal, it was not error to allow him nineteen and one-fourth permanent disability.

Juergens Bros. Co. vs. Industrial Commission, 125 N. E. 337,

Holds that where the injury necessitated the removal of the lens of an eye, leaving it so that it could not be used because it would not co-oordinate with the normal eye, although by the use of various lenses the servant might have some use of the injured eye, and in case of loss of the other eye it would be of benefit to him, he must be deemed to have suffered a total loss of one eye.

Stefan vs. Red Star Mill & Elevator Co., 187 Pac. 861

Holds that where an injury to an eye is such that it distorts the angle of vision thereof, but does not destroy the vision, so that the use of both eyes caused a double vision and in order to see, it was necessary that the in-

jured eye be kept covered, the employee suffered permanent loss of the use of an eye.

Butch vs. Shaver, 184 N. W. 572,
Holds that where an employee has the sight of her eye irrecoverably destroyed, though with extra artificial means she may have fair vision, she is entitled to compensation as for the loss of an eye.

Johannsen vs. Union Iron Works, 117 A. 639,
Holds that an employee suffering an injury to his eye, causing permanent impairment of the vision, is entitled to compensation although the vision can be rendered normal by the use of glasses.

Winona Oil Company vs. Smithson, 209 Pac 398,
Holds that under the law where the injured employee lost all practical use of an eye, he was entitled to compensation irrespective of his ability to continue to perform the work in which he was engaged at the time of the injury.

Maryland Refining Company vs. Colbaugh, 238 Pac. 831,
Holds that under the law relating to compensation for loss of an eye the State Industrial Commission is not required to take into consideration that effect of permanent injury to eye might be minimized by artificial means.

Alessandro Petrillo Co. vs. Marioni, 131 At. 164,
Holds that loss of vision in an eye must be determined without the use of lenses, and cites many cases in support of the rule.

Traveler's Insurance Co. vs. Richmond, 284 S. W. 698,

Holds that if there is a total loss of vision without the use of lenses, even if by the use of lenses there was considerable vision it is a total loss of sight in an eye. This case was reversed, 291 S. W. 1085, on the ground that there was not a total loss of vision without glasses.

Suggs vs. Ternstedt Manufacturing Co., 206 N. W. 490.

This was an appeal from an order of the Department of Labor and Industry. In this case the eye had been injured by a piece of steel and a traumatic cataract had formed. It had been removed by an operation, the expense of which, was borne by the defendant. Since the operation, the plaintiff had one-sixtieth normal vision without the use of glasses, but with a strong lens, his vision with the operated eye was above normal, but his two eyes did not co-ordinate. The Commission held that he was entitled to a statutory compensation for the loss of an eye. The Court holds that the exact question is new to the Court, but that the question has been decided in other courts. In the New York case of Frings vs. Pierce Arrow Motor Car Co., 182 App. Div. 445, which case was very much like the case thereunder consideration, it was held that since the workman, with the aid of proper glasses, had at least normal vision, although such eye did not co-ordinate with the injured eye he had not lost an eye or the use of an eye, two justices dissenting. That the same division in the case of Smith vs. F. & B. Construction Co., 185 App Div.

51, where the injured workman with the use of a glass had but one-third vision with the injured eye, the award was sustained for the loss of an eye and the Court held that the rule laid down in the Frings case should not be extended beyond the facts there found.

The Court then cites the following with approval from the case of Juergens Bros. Co. vs. Industrial Commission Co., supra, as follows:

> "Plaintiff in error contends that, should Kaage lose the sight of his good eye, he could by the use of lenses gain the use of the injured eye, and therefore he has not lost the sight of the injured member. The question before this Court is whether or not this man has for all practical uses and purposes lost his eye. The application of laws of this character should not be made to depend upon fine-spun theories based upon scientific technicalities, but such laws should be given a practical construction and application. For all practical purposes, when a person has lost the sight of an eye, he has lost the eye, and to say that the statute providing compensation for the loss of the sight of an eye does not apply here because of the remote possibility of Kaage losing his good eye, whereby he can, through artificial means, gain a certain amount of use of the injured member, is to place a construction on a remedial act which deprives it of all practical effect. Such could not have been the intention of the Legislature in passing this act."

and holds that the Illinois case, above cited, is in accord with the weight of authority, and that the weight of authority sustains the finding of the commission.

In considering the effect of the foregoing cases it must be borne in mind that the Alaska statute ex-

pressly imposes upon the employer the duty to furnish medical treatment; that after the appellant had been discharged by the appellee's physician, Dr. Pigg, the appellant consulted a physician, Dr. Dawes, who in a note to the appellee asked that the eye be given further treatment; that the suggestion contained in the note was ignored by appellee and appellant was given no further medical or surgical treatment, although the statute expressly imposes upon the employer the duty to furnish such treatment. The appellee not only did not demand of the appellant that he be permitted to operate on his eye, but when asked to treat the eye, it refused and neglected to do so. The appellant did all he could do; the appellee simply failed to do its statutory duty. To hold that the appellant cannot recover because the eye could have been operated on and wasn't, is to allow the appellee to take advantage of its own wrong and neglect of statutory duty. Whatever else the law may permit, it does not permit this.

Under the facts in this case the operation, if any was performed, would have to be for the removal of the lens. This lens if removed would have to be replaced with an artificial lens, which artificial lens would not have the power of accommodation, and for this reason the eye with the artificial lens would not co-ordinate with the other eye. This being so, and the rule of law as laid down in the foregoing cases being that under such conditions the plaintiff would be entitled to recover for the loss of an eye, it is immaterial whether or not an operation has been performed, the testimony being that

while the operation is comparatively simple, it is a delicate operation; that the result of the operation at best would be to restore partial vision with the use of glasses, which eye with the use of glasses would not co-ordinate with the natural eye and would blur, and would have no useful vision without glasses.

Surely under such testimony it can not be said that the operation was reasonably certain to effect a cure, or that the refusal of the plaintiff, even if an operation was demanded by the defendant, would be unreasonable. We, however, contend that the defendant did not request or demand that the plaintiff be operated upon or treated; that the plaintiff in effect requested such treatment, which treatment was tacitly refused plaintiff by the defendant; that under the law, the defendant was required to furnish such treatment; and that the defendant can not take advantage of its own wrong. We think the Appellate Court should reverse this cause and send it back to the District Court for re-trial.

Respectfully submitted on this brief without oral argument.

J. A. HELLENTHAL,
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Attorneys for Appellant.

NO. 6439

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETER SEKINOFF,

Appellant,

vs.

N. P. SEVERIN COMPANY, a partnership, of which N. P. SEVERIN and A. N. SEVERIN are members.

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE, AT JUNEAU

BRIEF OF APPELLEE

H. L. FAULKNER,
Juneau, Alaska,
Attorney for Appellee.

NO. 6439

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETER SEKINOFF,
Appellant,

vs.

N. P. SEVERIN COMPANY, a partnership, of which N. P. SEVERIN and A. N. SEVERIN are members.
Appellee.

BRIEF FOR APPELLEE

Upon Appeal From the District Court of the United States for the Territory of Alaska, Division Number One.

STATEMENT

This is an action brought by Peter Sekinoff, appellant, who was the plaintiff in the court below, and who will be hereafter referred to in this brief as the plaintiff, against the N. P. Severin Company, appellee,

defendant in the court below, who will be referred to herein as the defendant. The action is brought under the provisions of Chapter 25 of the Laws of Alaska of 1929, commonly known and referred to as the "Alaska Workmen's Compensation Act."

The suit is brought under the provisions of Section 1 of said Act, found in the last two paragraphs of said Section 1 of the act, commencing at the middle of page 53 of the Laws of Alaska of 1929. The part of Section 1 upon which the suit is founded, reads as follows:

> "Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars ($7,200.00).
>
> "To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars ($7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury

would be such as to reduce his or her earning capacity twenty-five (25%) per centum, he or she would be entitled to receive One Thousand Eight Hundred Dollars ($1,800.00) it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that twenty-five (25%) per centum does to one hundred (100%) per centum. Should such employee receive an injury that would impair his or her earning capacity seventy-five (75%) per centum, he or she would be entitled to receive Five Thousand Four Hundred Dollars ($5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that seventy-five (75%) per centum does to one hundred (100%) per centum."

The amended complaint alleges that the injuries complained of are permanent and have resulted in the total loss of the left eye and injury to the right eye, thereby resulting in the destruction of 50% of plaintiff's earning capacity. (See Par. II Amended Complaint, Tr. p. 2).

The defendant, by its answer denies that plaintiff received any personal injuries while employed by defendant.

Upon the issues as made by the amended complaint and the answer, the case was tried in the District Court before a jury, and, on the completion of the evidence, the court directed a verdict in favor of the defendant, and judgment was entered accordingly; and it is from this judgment that plaintiff has appealed. The sole assignment of error is that the

court erred in directing the verdict in favor of defendant and in entering judgment on said directed verdict.

POINTS, ARGUMENTS AND AUTHORITIES

The defendant contends:

FIRST: That since the action was brought under the last two paragraphs of Section 1 of the Compensation Act, and compensation was sought for loss of earning capacity, it was incumbent upon plaintiff to prove such loss; and that there was absolutely no evidence as to plaintiff's earning capacity, and nothing upon which a jury could be asked to compute the compensation due the plaintiff if they found he was injured as alleged; and,

SECOND: That there was no evidence of permanent injury,—the testimony showing only that plaintiff had a cataract in his left eye.

I.

THERE WAS ABSOLUTELY NO EVIDENCE OF LOSS OF EARNING CAPACITY

The sole testimony of plaintiff regarding earning capacity is as follows:

In answer to question of his counsel on direct

examination, he stated that during the last year he had been able to work and had worked in Ketchikan for a short time, but that he was not able to hold his job. (Tr. p. 9).

Again on cross examination he testified that after he brought the suit he went to Ketchikan and worked for some time in the saw mill. (Tr. p. 12).

Again in rebuttal on cross examination he stated, in answer to a question as to what he was doing in Ketchikan last summer, that he worked in the saw-mill. (Tr. p. 39).

It is true there are certain statements through the record showing that in years past he worked as a miner, but not a word anywhere as to his earning capacity, nor the kind of work he was accustomed to do or generally perform or had the ability to perform. He said he could not hold the job in Ketchikan; but he does not say what the job was nor what he earned nor why he could not hold the job. There is not a word anywhere about earnings nor earning capacity, either before or after the alleged accident; and nowhere does he state anything upon which a court or jury could base a finding as to any decrease or impairment of earning capacity.

Under the section of the compensation act applicable to this case, there must be partial permanent disability in order to justify a recovery, and this disability is measured in terms of loss of earning

capacity. This section of the statute was enacted to provide compensation in those cases where the employee receives an injury, which is permanent in character, and which does not come wholly within any of the specific cases for which provision is made in the preceding part of Section 1, which contains the schedules for loss of hand, loss of eye, loss of arm, finger, thumb, toe, etc. It is not walking capacity, lifting power nor vision that is involved, but loss of earning capacity. There is not one scintilla of evidence as to what plaintiff's earning capacity ever was. He simply tells us that he worked in Ketchikan in the sawmill after the alleged accident, and that he was not able to hold his job. So far as the record goes we are not informed of the nature of his job, whether it was one for which he was adapted or qualified, whether it was laboring work, clerical work or an executive position; and he does not say whether he lost it because of physical inability to hold it, or whether it was for some other reason.

> "Earning capacity does not necessarily mean the actual earnings that one who suffers an injury was making at the time the injuries were sustained, but refers to that which, by virtue of the training, experience and business acumen possessed, an individual is capable of earning."
>
> (*Words and phrases*, 3rd Series, Vol. 3, p. 115.)
>
> (*Texas El. Ry. vs. Worthy*, 250 S. W. p. 710.)

The general rule is that:

> "The measure of damages for impairment of earning capacity may be stated to be the difference between the amount which plaintiff was capable of earning before his injury and that which he is capable of earning thereafter * * * "

(17 C. J. p. 897.)

Our compensation act establishes the measure of damages, or the measure of recovery, in cases of this nature, by fixing certain percentages of a lump sum which are proportioned to the percentage of loss of earning capacity. It may be conceded that such a percentage could never be established to a mathematical certainty, but we submit that there must be some evidence upon which the jury can base an award. There must be some testimony as to what the plaintiff was capable of earning before the injury, and testimony as to what he is generally capable of earning after the alleged injury, so that the difference between the two may be computed in order to find the percentage of the lump sum amount to which the plaintiff would be entitled.

> "Evidence from which the amount may be determined is essential. It is an award for impairment or destruction of earning capacity. An award cannot be made from mere conjecture or without proper data furnished as evidence, although the evidence need not be clear and indubitable to entitle it to go to the jury, and the

law exacts only the kind of proof of which the fact to be proved is susceptible."

(17 C. J. p. 900).

Under the text in 17 C. J. p 900, quoted above, is a note which cites the case of *Olin vs. Bradford*, 24 Pa. Super, p. 7-10, which reads as follows:

"It is too well settled to require the citation of authorities, that such loss cannot be considered as an element of the measure of damages in the absence of evidence from which its pecuniary extent may be estimated. Even if we presume an earning capacity in a person of ordinary physical and mental powers, we cannot presume its quantum pecuniarily; and hence, without evidence on this point, there is no ground from which the pecuniary damage arising from its loss or impairment can be determined."

"Whether an employee's wages will be increased or diminished in the future, or whether he will certainly die sooner or later, is not fact of positive proof, but no sound rule of right and justice will permit a jury in assessing damages to be paid by one person to another, as compensation for pecuniary loss, to reach a conclusion of the amount to be paid from mere conjecture, or without regard to proper data furnished as evidence."

(*Seaboard Mfg. Co. vs. Woodson*, 11 Southern, 733).

"The general rule governing is that the evidence must be such as will enable the jury to

deduce a rational inference therefrom with respect to the matter involved."

(*Kerr vs. Frick*, 100 Atl. p. 135, 255 Pa. p. 452.)

II.

THERE WAS NO EVIDENCE THAT THE ALLEGED INJURY, IF THE PLAINTIFF RECEIVED SUCH IN THE EMPLOY OF DEFENDANT, WAS PERMANENT IN CHARACTER WITHIN THE MEANING OF THE STATUTE.

The plaintiff alleged in his complaint that while he was employed shoveling dirt, he was "hit by some foreign substance in his left eye, the actual substance being unknown to this plaintiff." (See Amended Complaint, Par. II).

Upon the trial he testified that something jumped and hit him in the left eye (Tr. p. 8). He further testified that he could see "pretty good" when he started to work for defendant, and that at the time of the trial he could see "nobody now" with the left eye. (Tr. p. 9).

Four doctors examined his eye at different times between the date of the alleged accident and the trial, including one eye specialist. These doctors, namely, Drs. Dawes, Council, Pigg and Southwell, testified at the trial. This was all the medical testimony intro-

duced. Dr. Dawes testified for the plaintiff, and the other three doctors for the defendant. None of them found any evidence of any injury to the eye.

Dr. Dawes testified that plaintiff had a cataract on the left eye. He knew nothing about the cause of the cataract except from the statement of plaintiff. (Tr. pp. 13-14); and that the cataract was ripe and ready for removal, and that if removed plaintiff could see with the left eye with the use of glasses. (Tr. p. 14).

Dr. Council said he had a cataract (Tr. p. 24); that the cataract could be removed, and that the operation, while delicate, was comparatively simple, with little reason to fear (Tr. p. 25); and that if the cataract were removed vision would be restored (Tr. p. 26).

Dr. Pigg stated that he had treated Sekinoff for both eyes ever since the year the cold storage plant was built (Tr. p. 29), (this was in the year 1927,—See testimony Hector McLean, Tr. p. 36); and that he had a cataract on one eye which was coming in 1927. (Tr. p. 29).

Dr. Southwell testified that he examined the plaintiff a few days before the trial in his office and that he found a cataract in the left eye (Tr. p. 33). He further testified that he found no evidence of a blow, puncture or scar which would cause traumatic cataract. (Tr. p. 33). He also testified that

the cataract could be removed by an operation which was not serious, and vision could be restored by the use of an optic lense. (Tr. p. 34).

This is all the testimony bearing on the permanency of the disability, and it will be seen from an examination of the testimony that no witness on either side testified that there was a permanent loss of vision in the left eye in any degree. It may be conceded that there would be some permanent impairment of vision even if the cataract were removed, but there is nothing upon which to base the measure of the loss of vision.

It must be remembered that plaintiff does not sue for the loss of an eye. He sues for decreased earning capacity, alleged to have been caused by the injury to the left eye and consequent strain on the right eye. The compensation act provides for payment of compensation for the loss of an eye, which, of course, means the total loss of the eye, or the use of the eye, where the same is permanent. It provides nothing for the partial permanent loss of vision; and if a man suffers a permanent partial loss of vision, and such permanent partial loss of vision impairs his earning capacity, he may be entitled to recovery under the provisions of the last two paragraphs of Section 1 of the Compensation Act hereinabove set forth. In other words, if a man loses 90% of the vision of one eye, he has not totally lost the eye nor the total use of the eye, but it may be that he would not be denied

some compensation under the circumstances; and an examination of the act discloses the fact that his compensation would have to be based upon the provisions of the last two paragraphs of Section 1 of the act: that is to say, upon decreased earning capacity, unless, of course, he should lose so much of the sight of the eye as to be considered for all practical purposes, the loss of the eye. In that case, of course, he would undoubtedly be entitled to be paid the amount provided for the loss of an eye.

However, as I have stated before, the plaintiff in this case has sought to recover for loss of his earning capacity and he has introduced no evidence bearing on such loss. If we were to take it for granted, without evidence, that the permanent partial loss of the vision of the eye might be considered in some degree impairing his earning capacity, it would certainly at least be necessary for him to prove the extent of the permanent impairment of vision,—approximately at least.

The testimony shows only that the plaintiff has a cataract on his left eye. It is true that Dr. Pigg testified that this cataract was not caused by any injury received while in the employ of the defendant, but that it had been present for two or three years before the date of the alleged accident (Tr. pp. 29-30); but aside from this testimony, the only evidence in the case is that there is a cataract on the left eye; and, conceding for the purpose of

argument that this cataract was caused by the accident complained of, still there is no evidence upon which a verdict for compensation could be based.

The only medical testimony bearing upon the point is to the effect that a cataract can be removed by an operation which is simple and not dangerous, and that if it is removed vision is restored, if not for all practical purposes, at least to a more or less extent. This would, of course, depend upon the age of the patient and the length of time perhaps the cataract had been present. We submit that it was the duty of the plaintiff before seeking compensation from the defendant, to have taken the necessary steps to have the cataract removed and the approximate extent of the impairment of vision determined, with a reasonable degree of certainty, before he would be entitled to compensation. There are many cases which hold that it is the duty of an injured employee to do this.

In the case of *Cline & Company xs. Studebaker Corporation*, L.R.A. 1916 C. p. 1139, 155 N. W., p. 519, the supreme court of Michigan held that it was the duty of the employee to minimize the injury as much as he reasonably could. In that case the court set aside an award based upon the finding that the employee had lost 90% of his sight, when, by the use of proper glasses, the loss could have been reduced to 50%.

In the case of *Joliet Motor Company vs. Industrial Board of Illinois*, 117 N. E., p. 423, the court held that the employee could not recover for the complete loss of his left eye due to a cataract which he ascribed to an injury he had received, where the evidence showed that there was a good probability of recovering normal vision for ordinary purposes, by the removal of the cataract. The claimant refused to have the cataract removed, and the court said that if the operation should be had and should prove unsuccessful, then the employer would be liable for the loss of the sight of the eye as well as for the surgical and hospital services necessary for the operation; but if the operation were successful, the employer's liability would be reduced.

See also:

Schiller vs. B. & O. Railroad, (Md.) 112 Atl. p. 272;

Myers vs. Wadsworth, (Mich), 183 N. W., p. 913;

Jandrus vs. Detroit Steel Products Co., (Mich.) 144 N.W., p. 563;

Lesh vs. Ill. Steel Co., (Wis.) 157 N.W. p. 539.

The Alaska Compensation Act makes no provision for requiring the employee to submit to an operation, and the plaintiff testified that the operation would cost $250. There is no testimony in the

case that he ever applied to the defendant for the operation. On the contrary, Mr. Curtiss, the defendant's superintendent and the man in charge of the work in which the plaintiff alleges he was injured, testified that he never applied to him for medical attention, and that he had no intimation of the claim for compensation until the suit was filed. (Tr. pp. 22-23).

Section 2 of the Alaska Compensation Act, found on page 54 of the laws of 1929, provides as follows:

> "Section 2. And in addition to the compensation for injured employees in this Act otherwise provided, the employer shall furnish to and for each injured employee such reasonably necessary medical, surgical and hospital treatment, including necessary transportation to and from hospitals, as may be required by reason of the injury, for a period of not exceeding one year from and after the date of injury to any such employee; and the employer in order to create a fund out of which the expense of such treatment may be paid, may charge against and deduct from the wages of each employee, as and when the same are paid, the sum of not to exceed Two Dollars and Fifty Cents ($2.50) per month; provided that not more than one half of the monthly rate may be deducted unless the employee be employed for more than fifteen days the money so deducted and withheld by the employer shall be kept by him in a separate fund and used only to cover the services and treatment in this section provided, and if the fund so created be insufficient, such deficiency as may reasonably arise, shall be paid by the employer without any charge therefor against the

injured employee or any other of the employees; and the employer shall have the exclusive right, and it shall be his duty to select and furnish the necessary physicians, surgeons and hospitals and to that end he may enter into all necessary contracts with such physicians, surgeons and hospitals for the furnishing of such services and treatments. Nothing contained in this section shall be construed to limit the right of the employee, to provide in any case, at his own expense, a consulting physician or any attending physician whom he may desire. The fund hereby created by deductions herein allowed to be made by the employer from the wages of employees shall be and the same is hereby made a trust fund which can be used only for the purposes herein set out. Whenever any employer shall cease his business or operations and go out of the business in which such employer had been theretofore engaged, any part of the fund created by this section and remaining in the possession of such employer shall, by the employer, be paid to the Territorial Treasurer and by him covered into the general territorial funds."

Under this section therefore, if the plaintiff was injured in the employ of defendant, the defendant was liable for the medical, surgical and hospital treatment, which would include the operation for the removal of the cataract; but the defendant could not very well be charged with having this operation performed, unless the plaintiff had applied to it for the operation, or at least informed the defendant that the operation was necessary. This was not done.

It will be seen that Section 2 provides that the

employer may deduct a sum not to exceed $2.50 per month from the employee's wages in order to create a medical and hospital fund; but there is no testimony in the case that the defendant did this; and, in any event, the compensation act makes the defendant liable for expenses of the operation in case of injury.

One of the leading cases on this point is the case of *Strong vs. Sonken-Galamba Iron Co.*, decided by the Supreme Court of Kansas and found in 198 Pac., p. 182. This case is squarely in point for the reason that the Kansas statute, like the Alaska statute, makes no provision for compelling the injured employee to submit to an operation in order to minimize his injuries and decrease his disability. The court held, that statute or no, it was the employee's duty to submit to the operation. The court said:

> "It was vigorously contended by appellant that one should not, as a condition precedent to payment of continued compensation during disability, be required to submit to an operation, the result of which might be fatal, even if such result is so unlikely as to make the danger practically negligible. To support this contention he has cited three authorities, all being New Jersey cases. (Citing the three cases.)
>
> "The overwhelming weight of authority is opposed to this view, holding that a man cannot continue to receive compensation and at the same time refuse to submit to proper medical or surgical treatment such as an ordinarily rea-

sonable man would submit to in like circumstances.

"The proposition that an applicant under the provisions of this humane law, may create, continue, or even increase his disability by his willful, unreasonable, and negligent conduct, claim compensation from his employer for his disability so caused, and thereby cast the burden of his wrongful act upon society, is not only utterly repugnant to all principles of law, but is abhorrent to that sense of justice common to all mankind."

In the case of *Mt. Olive Coal Co., vs. Industrial Commission*, 129 N. E., p. 103, (Ill.), the operation to the employee's wrist, which, it was contended would restore its use, was a simple one, unattended with danger. The continuance of his total disability was held due to his unreasonable refusal to submit to an operation. The court said:

"It is conceded that there is no power in the industrial commission or elsewhere to compel defendant in error to submit to an operation; but, on the other hand, it must be conceded that whether the loss of 80% of the use of the right hand of defendant in error is attributable to the accident or to the refusal of defendant in error to have the adhesions in the tendons forcibly broken up is a question for the commission, in the first instance, to determine. The uncontradicted evidence in the record shows that there was no possibility of danger to the defendant in error from the operation. It is such an operation as any reasonable man would take advantage of, if he had no one against whom he could claim compensation. A reasonable and

> salutary rule, which has been followed by the American and English courts of last resort, is this: 'If the operation is not attended with danger to the life or health or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employer from the obligation to maintain him'."

(See also *Joliet Motor Co. vs. Industrial Board*, 117 N.E., 423).

A recent case decided by the Circuit Court of Appeals for the Eighth Circuit, is the case of *U. S. Smelting, Mining and Refining Co. vs. Evans*, 35 Fed. (2nd Series), p. 460. In that case the Utah Industrial Commission had allowed a claimant compensation for total disability where the sight of the left eye was permanently lost, and the sight of the right eye reduced to less than 10% of normal vision without glasses,—normal near vision and limited distant vision with glasses. The appellant employer waived its right to seek a review of the findings of the commission in the Supreme Court of Utah, and applied to the Federal District Court for an injunction enjoining the enforcement of the Commission's award. The Federal District Court dismissed the case and the Circuit Court of Appeals affirmed the District Court and held that the Federal courts were without jurisdiction; although the Commission had acted mistak-

enly. The Circuit Court of Appeals in that case said:

> "We may assume, *and it is our opinion,* from the cases cited, that if the case before the Commission might be reveiwed on the merits in the Federal Courts, appellee, having only a partial loss of vision, which was subject to correction by the use of glasses, did not sustain a total disability." (italics ours)

See also *Moran vs. Oklahoma Engineering and Machine Boiler Co.* 214 Pac. 913 (Okla.); *Crane Enamelware Co. vs. Dotson,* 277 S.W. 902.

The general rule seems to be that if the operation is a major operation or attended with danger, or if the results are doubtful, the employee is under no obligation to submit to it; but, if the operation is a minor one, simple and not dangerous, as all the testimony in this case shows the operation in question to be, then it is the duty of the employee to have the operation performed.

It is argued by appellant that the employer in this case never tendered an operation to the plaintiff. However, under the Alaska statute, if the employee was injured the employer became liable for the expenses of the operation, and, where the employee did not make application to the employer nor inform the defendant that he had a cataract and that an operation was necessary, then, in the very nature of things, the employer could not have tendered the

operation; and it was the duty of the plaintiff to have either had the operation performed by his own physician before he brought suit, or to have requested the defendant to have had it performed for him. He did not do this. It is true that Dr. Dawes sent a note, the exact contents of which have not been disclosed, to the "boss" (whoever that might have been), stating that the eye needed attention (Tr. p. 13-14). This note was afterward destroyed by Dr. Dawes, (Tr. p. 14), and the uncontroverted testimony of the defendant is that it was not notified of any alleged accident, nor claim on the part of the plaintiff until the suit for compensation was filed and the papers served on the superintendent. (Testimony of Curtis, Tr. pp. 22-23).

APPELLANT'S AUTHORITIES

Atlantic Oil Producing Co. vs. Houston, 298 Pac. 245.

In that case there was no question as to the total permanent loss of the left eye, for the eyeball had been removed, and the question was as to the degree of injury to the right eye caused by infection resulting from the injury and loss of left eye. That case differs from this case because here, we contend there is no evidence of total permanent loss of the eye nor of the degree of partial permanent loss, if any.

Moran vs. Oklahoma Engineering and Machine and Boiler Co., 214 Pac. 913.

In that case the claimant was receiving compensation in weekly payments as provided by the Oklahoma statute. The insurance carrier received permission from the State Industrial Commission to have a further medical examination made, with the result that two doctors recommended a certain operation as an experiment, after which if this was not successful they proposed a further major operation. The employee consented to this but afterward changed his mind and compensation was suspended on that account. However, there was no assurance in that case that the operation proposed would work a cure, nor that it was simple or safe and as has been stated it was to have been largely in the nature of an experiment. The court properly held that suspension of compensation under such circumstances was not justified.

Lesh vs. Illinois Steel Company, 157 N. W. 539.

This case must have been cited by appellant inadvertently for it supports our position and has been hereinabove cited by us.

Gildersleeve et al. vs. Industrial Commission et al. 295 Pac. 1033.

This is a California case brought under a statute entirely different from the Alaska statute. The last

paragraph of that decision is the only portion of it which is pertinent here; and that paragraph reads as follows:

> "Petitioner also seeks a reduction of disability indemnity under Sec. 11 (e) of the Act (St. 1917, p. 842), on the ground that the disability now existing was caused or aggravated by unreasonable refusal to accept proper medical treatment. This issue like the first is determined by the finding of the commission that there was not a sufficient tender of such treatment."

The California act apparently provides for a certain procedure in such cases, which provision is not found in the Alaska act. This case is not in point because the appellee here is not seeking a reduction of disability indemnity nor a discontinuance of payments nor anything of the sort. In that case the injury was admitted. In this case appellee's position is that Sekinoff was not injured in their employ; and the burden was on him to prove, first: that he was injured in Severin's employ, and second: that the injury was permanent, and third: the degree of permanent disability, whether that be 50% loss of earning capacity or total permanent loss of eye. Since this burden was on him it was incumbent upon him to properly treat the cataract so that when he came into court he would be able to show the degree of permanent injury. Upon the trial of the case his position was somewhat like that of a man having a broken leg received in the course of his employment, who would come into court the next day and

show that the leg was useless because of the fracture without any showing that he had ever attempted to have the bones set and without any showing that the condition of the leg was permanent.

O'Neill vs. Industrial Accident Commission, 266 Pac. 866.

The same argument applies in this case as in the Gildersleeve case, supra.

Kingsport Silk Mills vs. Cox, 33 S. W. 2nd 90.

In that case the physicians who testified differed in their opinions as to the probable result of the operation. In this case, however, there is no conflict in the medical testimony. All the doctors on both sides said an operation for removal of the cataract was simple and not dangerous and that it would restore sight to a certain degree which, of course, could not be computed until after the operation; in fact, Dr. Council testified that if the cataract were removed he would already have vision and could see at a distance fairly well. (Tr. p. 26).

Moran vs. Oklahoma Engineering Co. et al., supra.

It is suggested by appellant on Page 12 of his brief that the burden of proof is on the employer to establish all facts as to whether or not refusal to submit to an operation and treatment was unreasonable, etc. We repeat that in this case there was no

conflict of the testimony. There was no testimony showing the degree of permanent injury, if any.

Consolidated Lead & Zinc Co. vs. The State Industrial et al., 295 Pac. 210.

This case is not in point for the reason that we do not question the general rule that if the operation in question is attended with any risk, there is no obligation on the part of the employee to submit to it; but we do contend that the rule is different where all the testimony shows an operation to be simple and not dangerous.

McNamara vs. Metropolitan State Railway Co., 114 S. W. 50.

This does not appear to be a compensation case and an examination of the opinion of the court discloses the fact that the operation there involved was described as somewhat dangerous.

Graf vs. National Steel Products Co., 38 S. W. 2nd, 518.

That case differs from this case because there the facts established were that without glasses the employee had lost 94.6% vision and with glasses 20.8%. The statute in that case was materially different from the Alaska statute; and apparently provided compensation for partial loss of a member. No such provision is made in the Alaska Statute and compensation is awarded here either for total perma-

nent disability or total partial disability based on a percentage of earning capacity, or the loss of a member. Plaintiff here proved no loss of earning capacity, nor did he prove loss of a member within the meaning of the Alaska statute; and even if the Alaska statute had provided for partial permanent loss of a member, no evidence was introduced which would support such an award.

Globe Cotton Oil Mills vs. Industrial Accident Commission, 221 Pac. 658.

In that case again the compensation depended upon the degree or extent of the loss of vision and this degree had been determined and found to be 1/100 vision without glasses, and practically normal with glasses; and under the statutes the claimant was awarded 19½% total disability. We may concede for the sake of argument that if appellant had proved that his vision was so far destroyed as to leave him only 1/100 of normal vision he would be entitled to compensation for the loss of the eye even though the statute makes provision only for total loss; but there is nothing in the record upon which any court or jury could base such an award.

Juergens Bros. Co. vs. Industrial Commission, 125 N. E. 337. (Ill.)

In that case a cataract had been removed from claimant's eye and the testimony showed an estimated loss of three-fourths of normal vision with

lenses. In the instant case since the cataract was not removed no one knows what the vision would be, either with or without glasses.

Stefan vs. Red Star Mill & Elevator Co., 187 Pac. 861.

That case is not in point for the reason that on account of the injury to claimant's eye the vision of both eyes was so distorted that the injured eye had to be kept covered in order that he might see from the other eye and there was no known remedy for this condition. The court held that this was equivalent to the permanent loss of the use of the eye and we agree with the court.

Butch vs. Shaver, 184 N. W. 572.

There again the cataract had been removed and the exact condition of the eye determined so that a finding could be made by the commission under the Minnesota law so that the matter was not left to speculation.

Johannsen vs. Union Iron Works, 117 A. 639.

In that case claimant was awarded compensation for loss of one-third vision of eye and was awarded compensation on a weekly wage basis for so many weeks, under the provisions of the statute. In that case the degree of loss had been determined so that the commission had the correct basis for its award,

but in the instant case no basis was given for the computation of compensation.

Winona Oil Company vs. Smithson, 209 Pac. 398.

That case holds that where claimant loses all practical use of an eye he should receive compensation even if he can continue work. This might be true under the Alaska statute, and if the testimony had shown plaintiff to have lost all practical use of his eye permanently he might be entitled to compensation for loss of an eye.

Marland Refining Company vs. Colbaugh, 238 Pac. 831.

In that case claimant lost 60% of the use of the eye. This fact was found by the commission. The Oklahoma statute made specific provision for such percentages of loss, thereby differing from the Alaska act, which provides only for the total permanent loss of the eye, other injuries being compensated for on the basis of degree of loss of earning capacity.

Alessandro Petrillo Co. vs. Marioni, 131 At. 164.

That was a Delaware case and the statute there provided for compensation for loss of fractional part of vision of eye and the commission awarded compensation on that basis under the statute after the percentage of loss had been determined.

Traveler's Insurance Co. vs. Richmond, 284 S. W. 698.

There also the degree of total permanent loss of vision had been determined.

Suggs vs. Ternstedt Manufacturing Co., 206 N. W. 490.

In that case again the cataract had been removed before the compensation was awarded and the extent of total disability or impairment of vision had been ascertained.

It will therefore be seen from an examination of the decisions upon the question as to whether or not the employee is bound to submit to an operation to lessen his disability, that there is some conflict of authority, although we contend that the overwhelming weight of authority is that where the operation is simple and not dangerous it is the employee's duty to submit to it and thereby lessen his disability, if possible.

Aside from this, however, we contend that there is no evidence in this case of the total permanent loss of the eye.

There is also a conflict of authority upon the point as to whether the compensation is to be fixed on the degree of loss with glasses, or without, even in those states where the statutes provide for compensation for partial loss of vision. The Circuit

Court of Appeals for the 8th Circuit in the case of *U. S. Smelting, Mining, and Refining Company vs. Evans, supra,* holds that a partial loss of vision with glasses would not be considered total loss of the eye. However, aside from that question we have here a case in which there is no evidence as to the extent of the total permanent loss. We have no basis upon which to compute the extent of the impairment of vision, nor what vision will remain permanently. Sekinoff showed nothing except that he had a cataract in the left eye, which he seems to insist on keeping. We can find no case where under such circumstances any claimant has been awarded compensation.

CONCLUSION

The plaintiff sued for compensation based on 50% permanent loss of earning capacity. He introduced no testimony tending to show any loss of earning capacity. The only testimony was that after the alleged accident he went back to the defendant company for employment but was told there was no place for him, (Tr. p. 9). He does not say why there was no place for him and certainly there is no hint that it was because of his physical condition. The natural inference would be from all the testimony that since plaintiff had been employed digging holes for the foundation of a building, in the very nature of things such work would be temporary only and would soon be finished. It is not as though he had

been employed in a manufacturing plant in a position which was a continuing one.

Having failed to introduce any testimony showing loss of earning capacity to support the allegations of his complaint he now contends that he should have been awarded compensation for the loss of the eye; and in support of such contention his only argument is that he had a cataract in the left eye at the time of the trial. There is no evidence that this cataract was caused by the alleged injury. All the doctors testified that there was no evidence of such a blow or wound on the eye which would ordinarily be necessary to cause a traumatic cataract; and all the testimony was to the effect that the removal of such a cataract as plaintiff had was a simple matter, and the record shows that the degree of loss of vision even if compensation could be based on any such degree short of total loss could not be computed. It was incumbent on the plaintiff to introduce testimony to prove either permanent loss of earning capacity in some degree or the total permanent loss of the eye. He did neither.

We, therefore, respectfully submit that the judgment of the District Court should be affirmed.

H. L. FAULKNER,

Attorney for Appellee.

No. 6442

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN LIFE INSURANCE COMPANY
(a corporation),
Appellant,

vs.

EMMA C. KING,
Appellee.

APPELLANT'S OPENING BRIEF.

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Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

This is an action brought in equity by the Northern Life Insurance Company against Emma C. King, individually, and as executrix of the will of Frank Mathew Kasshafer, deceased.

The action was brought to obtain an order decreeing that a certain policy of insurance, issued upon the life of said decedent by the plaintiff herein, was null and void because of the breach of various warranties and the fraudulent inducement of the contract by reason of false statements made by the decedent in his application and to the examining physician.

The policy contained a provision that the same should be incontestable two years after the date of its issuance. It was delivered on September 25, 1928, and

the insured died on February 25, 1930. No action having been brought by the beneficiary, the plaintiff herein filed this bill in equity in order to prevent loss of its rights by the lapse of time. The case was tried and the learned District Court entered a decree that plaintiff take nothing and ordered judgment in favor of the defendant, who was the beneficiary under the policy, in the sum of seventy-five hundred ($7500.00) dollars.

In the main, the contract of insurance in question is the usual one and contains a clause to the effect that the policy and the application therefor, a copy of which is attached to the policy, constitute the entire contract between the parties, and that no statement made by the insured should avoid the policy or be used in defense against any claim unless contained in the written application. Further, that all statements made by the insured should, in the absence of fraud, be considered representations and not warranties.

The bill alleges decedent applied for insurance on the 17th of August, 1928, the particular policy applied for being one whereunder there should be issued a contract insuring the life of the applicant in the sum of twenty-five hundred dollars, and providing that twenty-five hundred dollars more should be paid in the event that death was accidental, and that a third twenty-five hundred dollars should be paid if death occurred by reason of an automobile accident.

It is further alleged that the policy of life insurance so applied for was duly issued and delivered to the decedent pursuant to his application and examination

and a copy of the policy so issued was attached to the bill by way of exhibit, being Exhibit A thereto, and by the answer admitted to be correct. A copy of the application, a photostatic copy of which was annexed to the policy, was likewise attached to the bill herein, as Exhibit B, and it appears in the Transcript between pages 8 to 13. The correctness of both the copies of the policy and application are admitted in the answer.

The bill further alleges that after making the application the decedent went before one Dr. Paul Wright for examination touching his health and physical condition as such applicant for insurance, and that at such examination of insured certain questions appearing on the printed form were put to and answered by him, the answers being put down in writing and the applicant making a written declaration over his signature to the effect that the answers which he had so made and which had been so written, were true and correct. The document referred to was attached to the bill as Exhibit C and admitted to be correct by the answer. A photostatic copy thereof appears in the Transcript between pages 8 and 13, Exhibit B and Exhibit C forming, in reality, a single document, the first part consisting of the application and the second part of the medical examiner's report, containing the answers of the applicant to the questions asked.

It is further alleged that in reliance upon the application and the report, the policy was issued and delivered to the decedent on or about September 25, 1928, at which time the decedent receipted therefor.

The bill alleges that in the issuance of the policy and in the delivery thereof, the plaintiff relied upon the truth of the statements made in said Exhibit C, and had it known that the same were not true, as in the bill alleged, would not have issued or delivered the policy.

As to the particulars wherein it is claimed by plaintiff that the statements contained in the application were untrue, the bill sets out that the applicant, with intent to cheat and deceive plaintiff into the issuance of the policy, stated in his application for insurance that although he had previously suffered from peptic ulcer, he had recovered therefrom; that the duration of the illness had been only three weeks; that it had been moderate; that, in respect of the illness, or any other illness, he had not consulted any physician within three years next prior to the application, save that he had consulted Dr. Paul Wright in March of 1925 in respect of the peptic ulcer infection; whereas, in truth and in fact, so the bill alleges, the applicant had not ever recovered from the peptic ulcer illness, the duration thereof had exceeded three weeks, and the illness had been severe; and, in addition to all this, the applicant had actually consulted another physician in respect of the same illness, that is the peptic ulcer affliction, in November of 1927, within nine months of his application for insurance, and again in September of 1928, intermediate the application and the delivery of the policy, at both of which times he had received treatments from such physician. The application, instead of disclosing said facts, concealed the same from the plaintiff, thereby fraudulently inducing

the issuance of the policy and breaching the warranties embodied in his answers, which he, by his contract, warranted to be true.

It was further alleged in the bill that death occurred to the insured upon the 25th day of February, 1930, and that on the 27th of April, 1930, the plaintiff learned of the falsity of said representations and warranties and thereupon tendered to Emma C. King, as the executrix of the estate of the deceased, whom it may be said is likewise beneficiary under the policy, all premiums theretofore paid by the insured, and rescinded the contract of insurance.

All allegations of the bill touching upon fraud or breach of warranty were put in issue by the answer and in addition to her answer the defendant filed a cross-complaint seeking recovery under the policy of the sum of seventy-five hundred ($7500.00) dollars.

At the trial Dr. Paul Wright was a witness and testified (Transcript pages 32 to 38) that he acted as the examining physician of the plaintiff when Mr. Kasshafer applied for life insurance, conducting the examination on August 18, 1928; that he had treated Mr. Kasshafer for peptic or duodenal ulcer, that being his diagnosis, the treatment being in 1925; that the symptoms presented from which he made his diagnosis were hemorrhage, by vomiting once, distress in the intestine and hemorrhage showing in passages from the bowels; that he was called March 21, 1925, and hospitalized Mr. Kasshafer the same day, where he remained three days, when he went to his home; that Mr. Kasshafer had another hemorrhage from the bowels on the 25th so the physician rehospitalized

him, keeping him there until the 6th of April, following which the treatment was continued until June 23rd.

He further testified that Mr. Kasshafer, at the time of his examination, August 18, 1928, did not tell the examining physician that he had also consulted Dr. Hess, of San Francisco, approximately nine months prior to the examination and application or that he had taken treatment from Dr. Hess at about that time.

Dr. Hess was called and testified (Transcript pages 38 to 42) that on November 7, 1927, Mr. Kasshafer consulted him at his office in the Flood Building in San Francisco, as a patient and received treatment; that he gave a history of having had ulcers of the duodenum with a severe hemorrhage three years before the consultation; that he was at the time of the consultation suffering digestive disturbances and was afraid he might have a recurrence of the hemorrhage and ulcer; that he did not give the details of the treatment he had previously had for the ulcers, but did tell Dr. Hess that the symptoms were a hemorrhage and that there had been a diagnosis of ulcer of the duodenum, for which he received treatment.

He further stated to Dr. Hess that his reason for calling upon him was precautionary to prevent further trouble. He was given the usual physical and chemical examination but had no active disturbance at that time, although he had gas and indigestion. He was worried about his condition. He was given other examinations not connected with the question of ulcer, although the examinations were somewhat

superficial due to the fact that the patient gave a definite history of duodenal ulcer, and the physician took his word for that.

Dr. Hess prescribed a diet and medicine, the medicine being principally for the purpose of correcting hyperacidity, which precedes ulcer and is a cause of it. He was in the doctor's office several times over a course of several days.

The diet was one designed to be free of irritants, having no coarse foods or irritating things in it. Dr. Hess stated that a patient for peptic ulcer infections should keep on such a diet for a lifetime, and he supposed that he told Mr. Kasshafer that. The diet was a detailed diet and he told Mr. Kasshafer to remain on that diet permanently, giving it to him in detail so that he could keep right on it steadily.

The patient took considerable medicine away with him, and then came back the next year for more. He next visited Dr. Hess on September 11, 1928, the only symptom marked down at that time being gas. He stated he had been quite well during the year and came back for more medicine, which he believed had been successful. He asked for more of the same medicine, was given an additional supply and instructed to remain on the diet.

Upon cross-examination Dr. Hess said he was prompted to give both the tablets and the diet from the history the patient gave him and not from anything found in the examination; the history being the ulcer occurring three years before. Further, that Mr. Kasshafer looked well when he came down the second

time, and in fact was very well and was told to continue the treatment.

Mr. Bamford, assistant to the president of the Northern Life Insurance Company for twenty years prior to his testimony, and a member of the risk committee, whose duty it was to pass upon the acceptability of applicants for insurance, testified (Transcript pages 42 to 46) that in the *Kasshafer* case the Company had acted upon the application of Mr. Kasshafer, and that if the Company had known that in November of 1927 Mr. Kasshafer had consulted Dr. Hess, as a physician, and been treated by him as a patient, it would not have issued the policy without further examination or report upon the application, and that had it known that Mr. Kasshafer returned to Dr. Hess intermediate the application and the delivery of the policy, it would not have delivered the policy to him; that the Company relied upon the application made in considering the risk and in issuing the policy; that if Dr. Hess' name had been given as having been consulted by Kasshafer the Company would perhaps have followed it up to some extent; that the history of peptic ulcer in the application placed it very much on the border line of rejection and that it would have taken very little to have turned the scales against the acceptance of the risk; that the case was a border-line case and if there had been even the slightest indication that there was a possibility of a recurrence the policy would never have been issued and the application would have been rejected; that an extra premium had been charged because the risk was extra hazardous on

account of the physical history; that in issuing a rated up policy the Company considered the risk above normal but that even so the Company relied absolutely upon the showing in the application, particularly upon the absence of any showing of consultation after the treatment by Dr. Wright; and, that had it been otherwise, the policy would not have issued.

Dr. Charles Pius, (Transcript pages 47 to 49) who was a practicing physician and who had performed an autopsy upon deceased, testified that he found no evidence of scar tissue in the stomach or duodenum, and that he would not testify that death had been caused by stomach or duodenal conditions, or had been in anywise related to it.

There was testimony which we will not detail because we consider it immaterial, to the effect that the insured remained in good health up to the time of his death, actively following his occupation of cattle raiser and farmer, and that deceased actually came to his death in an automobile accident wherein his car, which he was driving, collided with a bridge railing, the insured dying shortly thereafter.

It was admitted that prior to the action and after death the plaintiff had attempted to rescind the contract of insurance, and had offered to refund the premiums received by it, with interest thereon, which offer had been refused. (Transcript page 20.)

SPECIFICATION OF ERRORS RELIED UPON AND OF ERRORS IN THE DECREE.

I.

The Court erred in permitting the witness, Dr. Paul Wright, to testify upon cross-examination that he had changed his opinion as to the original diagnosis of peptic ulcer because upon post mortem examination he had found no indication that peptic ulcer had ever existed.

In amplification of this specification we quote the following portion of the record:

> "I was present at a post-mortem examination of Mr. Kasshafer's body after his death.
>
> Q. Now, have you formed any different opinion, after being present at that post-mortem examination, as to your original diagnosis of Mr. Kasshafer?
>
> Mr. Van Dyke. We object to that as immaterial, incompetent, and irrelevant.
>
> The Court. Overruled.
>
> Mr. Van Dyke. Exception.
>
> The Witness. Yes, I have.
>
> The Witness (continuing). The post-mortem was on March 12, 1930, and was held at Yreka in Turner's Undertaking Parlors. Dr. Ray and Dr. Charles Pius were present. The stomach and the duodenum were opened in my presence.
>
> Q. State what you saw or found.
>
> Mr. Van Dyke. We object to any testimony concerning the autopsy or reference to the cause of death. It is immaterial so far as the case of the plaintiff here is concerned.
>
> The Court. Overruled.
>
> Mr. Van Dyke. Exception.
>
> A. They were apparently normal.

Q. Were there any scar tissues such as would follow the result of an ulcer from the stomach, that you saw?

Mr. Van Dyke. Same objection.

The Court. Overruled.

Exception noted.

The Witness. Not that we could discover. We found no scar tissue in the duodenum at the post-mortem. We could see no results of ulcer in either the stomach or duodenum at that time.

Mr. Van Dyke. Same objection.

The Court. Overruled.

Exception noted.

The Witness. A peptic ulcer is the destruction of the mucous membrane of either the stomach or intestine. We could find no evidence of either the duodenum or the stomach mucous membrane having been destroyed, previous to the post-mortem."

II.

The Court erred in permitting Dr. Charles Pius to testify on behalf of defendant that in his opinion the condition of the stomach and duodenum were entirely unrelated to the cause of death.

In amplification of this specification we quote the following from the transcript:

"After his death I made a post-mortem examination of his body. I opened his body, opened the duodenum, and made a thorough examination of his interior organs. I opened the stomach and the duodenum. This was all on February 28, 1930.

Q. Now, what did you find as to the interior of the stomach, and his duodenum?

Mr. Van Dyke. We object on the ground that it is immaterial, and is incompetent to prove any-

thing, particularly in view of the fact that so far as the case of the plaintiff is concerned, the cause of death is immaterial.

The Court. Overruled.

Exception noted.

A. There was no evidence of scar tissue in either the stomach or duodenum, and I was very careful to look for it, because there was an old history of ulcer from relatives. I found no evidence whatsoever. I found the other interior organs normal. Everything was normal. The pyloris, that is the muscular ring between the stomach and the duodenum, seemed to be thicker than it should have been, but there was no open lesion, or any sign of disease there.

Q. Now state what you found as to the external injuries which may or may not have caused this man's death.

Mr. Van Dyke. We make the same objection to all this line of testimony, that it is immaterial.

The Court. Overruled.

Exception noted.

A. There was a brownish discoloration under the left jaw; there was a discoloration over the right clavicular; there was a discoloration over the fourth rib at the sternal clavicular articulation; there was an abrasion on the right leg, and a similar abrasion on the lower end of the right leg; the muscles on the left chest wall showed a hemorrhage under the skin into the muscle.

Q. Now, what in your opinion, Doctor, was the cause of this man's death?

Mr. Van Dyke. Same objection.

The Court. Overruled.

Exception noted.

A. I would say it was vasomotor paralysis, af-

fecting the heart.

Q. State whether or not in your opinion any condition as to his stomach or duodenum in any way related to his death, or caused it.

Mr. Van Dyke. Same objection.

The Court. Overruled.

Exception noted.

The Witness. I would not testify any stomach or duodenal condition has caused his death, or was related to it."

III.

The Court erred in finding:

(a) That plaintiff issued and delivered to Kasshafer its contract and policy of insurance. (Transcript page 56.)

(b) That by reason of said policy it insured the life of Frank Mathew Kasshafer. (Transcript page 56.)

(c) That in making the application, Kasshafer was not guilty of fraud or misrepresentation, or statements made with intent to cheat or deceive the plaintiff into the issuing of the policy. (Transcript page 57.)

(d) That none of the statements made by Kasshafer were knowingly false. (Transcript page 57.)

(e) That the conduct of Kasshafer in applying for and procuring the issuance of the policy was neither false nor fraudulent nor done with the intent to deceive and defraud the plaintiff. (Transcript page 57.)

(f) That the policy was delivered to Kasshafer during his good health. (Transcript page 57.)

(g) That by reason of the death of Kasshafer plaintiff became indebted to defendant in the sum of seventy-five hundred ($7500.00) dollars, together with interest. (Transcript page 59.)

(h) That defendant was entitled to judgment in the sum of seventy-five hundred ($7500.00) dollars, with interest and costs. (Transcript page 60.)

IV.

The Court erred in refusing to incorporate in its decree plaintiff's proposed amendments to the proposed findings of the Court. (Transcript pages 60-63.)

ARGUMENT.

THE LEARNED DISTRICT COURT ERRED IN MAKING ITS FINDINGS AND RENDERING ITS JUDGMENT AGAINST THE PLAINTIFF AND IN FAVOR OF THE DEFENDANT AND IN FAILING TO DECREE AND ESTABLISH THE INVALIDITY OF THE POLICY OF INSURANCE, BECAUSE, FIRST, IT WAS OBTAINED BY A FRAUDULENT MISREPRESENTATION, AND, SECOND, IT WAS VOID FOR BREACH OF EXPRESS WARRANTY BROKEN IN ITS INCEPTION; AND, THE COURT FURTHER ERRED IN REFUSING TO ADOPT FINDINGS PROPOSED BY PLAINTIFF.

We do not believe it necessary to take up seriatim various assignments of error involving the validity of the judgment rendered, denying relief to the plaintiff. We believe that they may all be discussed under a general proposition, that the judgment is against the law and the evidence and entirely unsupported by the record.

It stands as an admitted proposition that Mr. Kasshafer, the insured, gave knowingly false answers to questions propounded to him by the insurer touching the state of his health and his eligibility as an insurable risk, and further that over his signature he solemnly declared that his answers to these questions so propounded to him were correct as written.

Question number seven was as follows: "Have you consulted any physician within the past three years?" To which question the answer was, "Yes," and to that extent it was a correct answer. The following question, dependent upon an affirmative answer of the first, was then asked: "If so give particulars required under question three above." The question numbered "three" to which he was thereby referred required him to give full particulars as to his consultation of any physician within the past three years. Admittedly he failed and refused to give honest answers in that he failed and refused to give full particulars. The examining physician was Dr. Paul Wright and of course the applicant knew that this physician had knowledge that Kasshafer had consulted him within that three year period and received treatment for peptic ulcer. The particulars as to that consultation and as to that treatment were, of course and perforce, given by the insured, but signally the insured confined his statement of particulars as to physicians consulted and treatment received to those particulars which he knew lay within the knowledge of the man before whom he was answering the questionnaire, and Kasshafer stopped short when he had given the information which he knew the examining physician had full and complete knowledge of.

He knew that he had gone to another physician, Dr. Hess, within nine months prior to the time he was making his answers in his application for insurance to the questions propounded to him by the proposed insurer. He knew that he had, himself, consulted with that physician. He knew that he had informed that physician of his prior treatment for peptic ulcer. He knew that he had consulted that physician because he feared a recurrence of that condition. He knew that Dr. Hess, in response to his application for medical advice and aid, had placed him upon a permanent diet planned to avoid a recurrence of ulcer. He knew that he had been since that consultation taking medicine designed to correct a condition conducive to the recurrence of ulcer and it is utterly inconceivable that he did not deliberately and knowingly conceal these facts from the proposed insurer. No man situated as was Kasshafer could have been asked as to physicians consulted by him within three years past and have believed for a moment that he was giving an honest answer, without disclosing the consultation with and continuous treatment by Dr. Hess. What thoughts were in his mind it is, of course, impossible to know, but from the circumstances it is equally impossible to conclude that he did not knowingly conceal from Dr. Wright his consultation with and treatment by Dr. Hess.

Therefore, when he signed the medical examiner's report, he knew that he had not given correct answers and with that knowledge he, nevertheless, warranted the answers to be correct.

Now, the only purpose that Kasshafer had in this matter was to induce the plaintiff here to issue to him a policy of insurance in accordance with his application therefor. That was the sole purpose of the application and of his submission to examination and questioning by the medical examiner for the Company.

The only fair inference from the testimony is that at the very time he appended his signature to that report he was following a diet prescribed by Dr. Hess, after consultation with him, and taking medicines prescribed by that physician. This inference is rendered inescapable in the light of the further testimony that within a few days after he had signed that application and report, he returned to Dr. Hess for further examination and to obtain additional medicines. It was not a matter, therefore, that could possibly have been a mere matter of oversight, but, on the contrary, was a matter uppermost in his mind.

We are not concerned with whether or not he had ever had peptic ulcer, with whether or not he needed treatment of any kind, with whether or not he was mistaken in his own belief that his condition properly warranted consultation with and treatment by a physician. These things were not for him to decide. He was seeking insurance and he undertook to give information touching the state of his health to the insurer and warranted the correctness of that information when he knew it to be false.

This contract of insurance was entered into at Edgewood, California (Exhibit B) and is covered by

the law of that State. Therefore, the following provisions of the Civil Code of California are pertinent:

"A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof." (*Civil Code* 2607.)

"The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitled the other to rescind." (*Civil Code* 2610.)

"A breach of warranty without fraud * * * broken in its inception prevents the policy from attaching to the risk." (*Civil Code* 2612.)

"A neglect to communicate that which a party knows, and ought to communicate, is called a concealment." (*Civil Code* 2561.)

"A concealment, whether intentional or unintentional, entitled the injured party to rescind a contract of insurance." (*Civil Code* 2562.)

"Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty." (*Civil Code* 2563.)

"Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." (*Civil Code* 2565.)

"The completion of the contract of insurance is the time to which a representation must be presumed to refer." (*Civil Code* 2577.)

"A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations." (*Civil Code* 2579.)

"Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract." (*Civil Code* 2583.)

The following rules of law declared by appellate tribunals in actions for the enforcement or cancellation of policies of insurance are deemed pertinent:

(a) When the materiality of the representations depends upon inferences from facts proved the question is one for the jury, but a different rule applies when the representations are in the form of written answers made to written questions. In such case the parties, by putting and answering the questions have indicated that they deemed the matter material.

McEwen v. New York Life Ins. Co., 23 Cal. App. 699.

(b) "It needs no citation of authority to support the rule that misrepresentation or concealment of the facts relative to the health of the assured are peculiarly fatal to contracts of life insurance because the companies necessarily rely upon the statements and acts of the insured in making contracts."

Layton v. New York Life Ins. Co., 55 Cal. App. 205 (citing:

Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631;

Whitney v. West Coast Life Ins. Co., 177 Cal. 74.)

(c) The fact that the insurer exacted and the applicant gave, a statement as to previous injuries to his eyes or defects of vision proves that the parties considered and agreed that this matter was material. Having so agreed, the fact of its materiality is binding upon them.

Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734;

Porter v. General Acc. etc. Assur. Corp., 30 Cal. App. 204.

(d) A false statement in an application in relation to the last time the applicant was treated by a physician and the disease for which he was last treated was both warranty and a representation material to the risk and if false avoids the policy.

Priestly v. Provident Sav. Co., 112 Fed. 271.

(e) A presumption of intent to deceive on the part of the applicant is only raised when the statements are made with knowledge of their falsity.

Whitney v. Westcoast Life Ins. Co., 177 Cal. 80.

We submit that the foregoing statement of facts viewed in the light of the foregoing Code sections and authorities, establish that there was proven in this case, without conflict, both fraudulent misrepresentation entitling the insurer to rescind, and breaches of express warranties preventing the policy from ever having attached to the risk.

It is true that the policy contains a provision that statements made by the insured should, in the absence of fraud, be considered representations and not warranties, but this stipulation does not aid the case of de-

fendant. This is so because, as we have heretofore stated, the statement of insured that he had not consulted any physician antedating his examination and application, except Dr. Paul Wright, was knowingly false and therefore, by law, conclusively presumed to have been made with fraudulent intent to deceive.

Hence, the statement, although sufficient in itself as a representation fraudulently made to entitle the insurer to rescind, goes further and becomes, under the Code declaration above quoted, an express warranty to the effect that no other medical consultation or treatment had been had or received during the three year period, covered by the questions asked, other than that Dr. Paul Wright had been consulted and the treatment delineated received from him.

In this connection it is impressive to note that Dr. Paul Wright, in his confidential report, stated to the company, in respect of that consultation and treatment that he believed the applicant to have entirely recovered from the ulcer of the stomach. (Transcript page 9.)

Under Section 2607 of the California Civil Code, the statement in the application, made by express agreement of the parties a part of the policy, since it was as to a matter relating to the person insured and to the risk, became an express warranty of the truth thereof. And, under Section 2612 of the Civil Code, that warranty broken in its inception prevented the policy from attaching to the risk.

It is, of course, true that contracts of insurance wherever ambiguous or uncertain will be construed

against the insurer, but that rule has no application to the present case. Touching the matters here under consideration, the contract of insurance was plain and easily understood. The question asked was simple and direct. The answer thereto was false and the applicant expressly affirmed it as being true.

As said by the Supreme Court of the United States in *Jeffries v. The Economical Mutual Life Insurance Company,* reported in 89 U. S. 47:

> "The want of honesty was on the part of the applicant. The attempt was to deceive the company. It is a case, so far as we can discover, in which law and justice point to the same result, to-wit, the exemption of the company."

Life insurance companies are, after all, not private corporations, but are repositories of the accumulated savings of policy holders. By his application, one seeking insurance requests admission into the great family of policy holders making up the owners of that wealth. The existing reserve of the companies has been built up of the prior contributions of policy holders. The applicant seeking to become a member of that group is asking to obtain the benefits of membership. It is only fair to require of him that if he desires to become such a member, he govern his actions by the rules of simple honesty. And where, as here, it is plainly shown that he departed from those rules knowingly and intentionally, it would be a gross injustice upon the group into which he has so fraudulently gained admission to permit either himself or his beneficiary to reap the fruits of that dishonesty. That group of policy holders have tendered back all

that the common fund received, together with interest. They ask only that the treasure-house they have filled for their protection during life and for the protection of their dependents after their death, be not made the subject of wrongful raid. A company which would permit payment to be made from the property of its insured upon a policy obtained as this one was obtained would be unworthy of the trust and confidence reposed in it by the great family of policy holders whose savings have builded its assets.

Kasshafer knew this policy was fraudulently and dishonestly obtained. Every day that he kept it in his possession after its delivery to him evidenced a continued intention upon his part to carry out and consummate that fraud. Every day that dishonest declaration uttered a renewed indictment against his honesty, and every day of its retention by him constituted a confession of guilt.

We, therefore, submit upon this branch of the case that the learned District Court erred in its refusal to give judgment decreeing the invalidity of that policy.

THE COURT ERRED IN PERMITTING THE WITNESS, DR. PAUL WRIGHT, TO TESTIFY UPON CROSS-EXAMINATION THAT HE HAD CHANGED HIS OPINION AS TO THE ORIGINAL DIAGNOSIS OF PEPTIC ULCER, BECAUSE UPON POST-MORTEM EXAMINATION HE HAD FOUND NO INDICATION THAT PEPTIC ULCER HAD EVER EXISTED.

We have heretofore set forth the portion of the transcript amplifying this specification of error.

Over repeated objections, the overruling of which was repeatedly excepted to, the Court permitted the

defendant to inject into the record testimony upon the point of whether or not Kasshafer had been in fact suffering from peptic ulcer when treated for that ailment by Dr. Paul Wright several years before his application for insurance, and also upon the question of whether or not he at any time had suffered from that ailment.

It was wholly immaterial whether the insured had or had not ever suffered from peptic ulcer. He was clearly called upon to disclose his consultation with Dr. Hess, and the particulars of treatment received by him. Even if it could be said that had the information been given, the policy might still have been issued after further investigation, although such an assumption is directly contrary to the evidence in the case, it still was not for Kasshafer to conceal the information requested and deny to the insurer the opportunity of considering the concealed facts in deciding upon the issuance or nonissuance of the policy.

As declared by the California Civil Code, Section 2565, "materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries," and the fact that the questions and answers were reduced to writing and expressly made a part of the contract, brings the case in its present aspect squarely within the rule declared in *McEwen v. New York Life Ins. Co.,* supra, wherein it is said that where the representations are in the form of written answers to written questions the parties by putting and an-

swering the questions have indicated that they deemed the matter material.

Consequently, we submit the Court erred in permitting the introduction of the testimony objected to.

THE COURT ERRED IN PERMITTING DR. CHARLES PIUS TO TESTIFY ON BEHALF OF THE DEFENDANT THAT IN HIS OPINION THE CONDITION OF THE STOMACH AND DUODENUM WERE ENTIRELY UNRELATED TO THE CAUSE OF DEATH.

We have heretofore given portions of the record in amplification of this specification of error.

As in the case of the testimony of Dr. Paul Wright, the Court permitted testimony by Dr. Pius as to the probable cause of death and as to whether or not it was in anywise due to peptic ulcer, which testimony was objected to upon the ground that it was immaterial as to whether or not peptic ulcer had anything to do with the death.

We need not dwell upon this for it falls under the same classification, and the contention of error is supported by the same authorities as we have heretofore referred to in connection with the specification of error next preceding.

CONCLUSION.

There is no conflict in this record upon any matter material to the issues. The correctness or incorrectness of the decree and of the various findings made in support of it, and of the Court's refusal to adopt the

findings proposed by the plaintiff, are all equally matters of law. There is neither conflict of fact nor a possibility of conflicting inferences to be drawn from the established facts.

It is a case where this Court should not only reverse the judgment of the Court below, but should enter a judgment in favor of the plaintiff, decreeing the invalidity of the contract and the cancellation of the purported policy issued in evidence thereof.

We respectfully ask that the judgment be reversed and that a decree be directed in favor of the plaintiff.

Dated, Sacramento,
September 21, 1931.

BUTLER, VAN DYKE, DESMOND & HARRIS,
Attorneys for Appellant.

No. 6442

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

EMMA C. KING,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

BUTLER, VAN DYKE, DESMOND & HARRIS,
Capital National Bank Building, Sacramento,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

No. 6442

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NORTHERN LIFE INSURANCE COMPANY
(a corporation),
Appellant,

vs.

EMMA C. KING,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant respectfully petitions this Court for a rehearing of its appeal in the above-entitled matter, and submits the following in support thereof:

We believe that the decision heretofore rendered, the opinion being filed November 9, 1931, constitutes not only a departure from the current of decisions upon the questions involved but likewise constitutes a definite step in the undermining of the basic plan upon which life insurance has been developed.

In many forms of insurance there is involved little, if any, selection of risks, whereas selection of risk is a fundamental factor in life insurance.

The policy issued to the decedent, Kasshafer, was one issued to a selected risk. It is true that sometimes insurance in limited amounts is written without physical examination by a physician, but that was not the kind of policy applied for by the deceased, and even in that form of policy there is a certain selection of risk through the medium of statements made by the assured in the application. Kasshafer desired and applied for a policy upon the selected risk basis, involving not only examination by a physician touching the immediate condition of his health, but in addition statements upon the same subject to be made by him.

We cheerfully concede that if the questions propounded to him were ambiguous so that an honest mistake might well be made in answers to them, the party of the contract bringing about the ambiguity should be the one to suffer if that mistake occurred or could reasonably be held to have occurred. Consequently it has been held, as has been pointed out in the opinion of this Court, that where questions are asked as to the existence, past or present, of specific diseases, considerable latitude would have to be allowed because the answer calls for a decision by the applicant upon matters with which such applicant might well be without accurate information; so, in those cases referred to in the opinion, where the questions were as to whether or not the applicant had suffered from specific diseases, such as "affection of the liver" and the applicant answered "No," the Courts hold that the question of good faith is not concluded by proving that the applicant actually had suffered from the disease but that it must go farther

and determine whether or not the attack constituted a material illness or malady having some direct and unmistakable bearing on the health of the applicant.

Such a rule is reasonable because the inquiry goes into matters about which a layman may be poorly, or not at all, informed. This rule was declared a long time ago in such cases as those cited in the opinion, as, for instance, *Connecticut Life Ins. Co. v. Union Trust Co.,* 112 U. S. 250, and it was because of such rulings that companies began to change the form of the questions. This they did, not because they did not want the information, which was actually vital to the successful conduct of the business of insuring lives, but because in view of the rule the answers to those questions could no longer be depended upon in the selection of the risk. Consequently applicants, in application forms such as was used in the case at bar were required to name the sources to which the insurer might go to determine whether or not the proffered risk was acceptable. And surely even a layman cannot be mistaken as to the names and the number of physicians consulted by him within a reasonably short period of time, which in the case of the application under consideration was fixed at three years. This is knowledge which the applicant has and which the insurer cannot possess. It is not asked for an idle purpose. It is a question which the insurer deems material. Its truthful answer is a reasonable requirement, and persons of the most limited intelligence cannot fail to understand it. It calls for no conclusion or reasoning by the applicant as to whether or not the illness treated or concerning the existence

of which the consultation was required, and the applicant has no right in common honesty to indulge in speculations concerning its materiality. It is far less effort for him to answer the question and speculation upon its materiality by the applicant indicates only an intention to withhold information requested. It can have no other basis.

We submit that cases such as *Connecticut Life Ins. Co. v. Union Trust Co.,* supra, have not the slightest application in the case at bar, and we respectfully assert that it is not for this Court in its determination of this case to say, "Was it obligatory upon the insured to disclose to the medical examiner acting for the insurance company the facts regarding his visits to Dr. Hess, considering his condition at the time of such visits?"

It was not for the applicant, in the beginning, if he were to act honestly, to consider "his condition at the time of such visits." He was not asked about that. He was asked if he had made the visits, the plain and only purpose of the question being to enable the insurer to make its own investigation concerning his condition at the time of such visits. To give to the assured the right of such consideration and the right to determine it is to destroy the basis of the contract between the parties, and to permit Courts and juries after the death of the assured to consider the assured's "condition at the time of such visits" is only again to deny to the insurer its right to consider for itself the acceptability of the applicant for insurance. It is to deny to the insurer the right to honestly and intelligently conduct its own business. It is to sub-

stitute the judgment of Courts and juries naturally and humanly favorable to the beneficiary as to how the business of the insurer should be run. It is to do violence to and to sweep away the basis of contracts of insurance. It is to confuse materiality of the question asked with materiality as to the effect of conditions upon the acceptability of the risk as those may have to be determined by evidence introduced long after the insurer has been denied its right to pass upon that matter. It is to violate the express mandate of the law under which this policy was written as embodied in Section 2564 of the Civil Code of California, which, after declaring that a party is guilty of concealment in respect of insurance contracts if he neglects to communicate that which he ought to communicate, excludes certain matters as to which he is not bound to answer "except in answer to the inquiries of the others"; that is to say, that he is bound to disclose where inquiry is made.

This Court, in holding that Kasshafer was not obligated to disclose the fact of his visits to Dr. Hess, relies upon *Bankers Life Co. v. Hollister* and *Wharton v. Aetna Life Ins. Co.,* both cited in the opinion.

These cases are cited as holding that an applicant for insurance in answer to a question as to whether he has consulted a physician, is not required to tell of consultation or treatment for slight or temporary indispositions, such as colds, insomnia, headache, constipation or the like.

We submit that these cases furnish no authority for declaring that Kasshafer was not obligated to disclose his consultations with Dr. Hess.

In the *Bankers Life* case the inquiry was so worded that it was held that the applicant could infer the consultations being asked about related to certain specific illnesses as to which inquiry was made, thus putting that case in the same class as the *Connecticut Life Ins. Co.* case discussed above.

It is then stated in the opinion that consultations for slight or temporary illness, such as ordinary colds or inability to sleep, should not, if not disclosed, avoid a policy, but nothing is said as to the form of the inquiry.

In the *Wharton* case the decision again turned, not upon the necessity for answering plain questions concerning consultations, but upon the form of the inquiry.

None of these cases are authority for declaring here that Kasshafer did not owe the obligation to disclose his visits to Dr. Hess. The testimony, without dispute, shows that he consulted Dr. Hess because he believed he was suffering a recurrence of peptic ulcer, gave to that physician a complete history of a preceding illness of peptic ulcer, which that physician accepted and upon which he based his treatment, which was continuous and was going on at the very time this application was made.

We respectfully submit, further, that this Court's analysis of the testimony contained in the concluding portion of its opinion as to what the testimony in the case shows with respect to the condition of Kasshafer at that time, is not a correct analysis of the evidence. It is true, as this Court has said, that Kasshafer

complained of indigestion and gas in the abdominal region but he also talked of ulcer and gave its precedent history. This Court says there were no symptoms of that disease present. Dr. Hess never determined that, because as he said, he accepted the history of peptic ulcer and based his treatment upon it. For that reason he made no critical examination. His treatment was based on the assumption of the existence of peptic ulcer or of the conditions precedent to its occurrence. Certainly Kasshafer was concerned about the recurrence of peptic ulcer; certainly that concern took him to Dr. Hess; certainly he received treatment based upon the theory that peptic ulcer was recurring or threatening; and yet with all this knowledge, the Court holds that he could honestly conceal that treatment and those consultations and was not obligated in any manner to disclose them.

Kasshafer is made the party to decide his acceptability as a risk for insurance, and whether he was right or not is finally to be submitted to the arbitrament of a tribunal sitting upon the matter after the risk has been incurred. The insurance company is required to abdicate and surrender itself to the beliefs and conclusions of the applicant. Life insurance business cannot be conducted upon any such basis.

What we have said here applies equally, we submit, to this Court's conclusion that it might be reasonably inferred that Kasshafer understood the statement as to his visits to Dr. Hess were not required to be given at that time. We do not know what is meant by "at that time." With no other time are we concerned.

Why is Kasshafer given the right, when inquiry is made concerning consultation with physicians, to select which physicians he shall name? Why is he given the right to choose the consultations as to which he shall make disclosure, if in fact there be more than one?

Kasshafer was then under treatment by another physician, whom he did not name. The matter could not have been absent from his mind. He knew what he was there for. He could not have misunderstood the question. He had no right to conceal the required information.

It should not be forgotten, as, we submit, it has been forgotten, that Kasshafer was not being asked about diseases but about consultations with physicians. As a layman he knew exactly what was meant; as a patient of Dr. Hess he knew he had not answered.

Nothing more than knowledge of falsity need be proven against him to convict him of intent to deceive.

> "Considered in most favorable light possible, the above quoted incorrect statements in the application are material representations, and nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud."
>
> *Mutual Life Ins. Co. v. Green,* 241 U. S. 676.

We respectfully submit that a rehearing be granted in this matter.

Dated, Sacramento,
December 7, 1931.

BUTLER, VAN DYKE, DESMOND & HARRIS,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Sacramento,
December 7, 1931.

B. F. VAN DYKE,
Of Counsel for Appellant and Petitioner.

No. 6145

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Application of

FOO GUEY and FOO WUNG,

For a Writ of Habeas Corpus.

FOO GUEY and FOO WUNG,

Appellants,

vs.

WALTER E. CARR, District Director of District No. 31, United States Immigration Service, at Los Angeles, California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Application of

FOO GUEY and FOO WUNG,

For a Writ of Habeas Corpus.

FOO GUEY and FOO WUNG,

Appellants,

vs.

WALTER E. CARR, District Director of District No. 31, United States Immigration Service, at Los Angeles, California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellants:

Y. C. HONG, Esq.,

741½ North Alameda St., Los Angeles, California.

For Appellee:

SAMUEL W. McNABB, Esq.,
United States Attorney;

MILO E. ROWELL, Esq.,
Assistant United States Attorney,
Federal Building, Los Angeles, California.

UNITED STATES OF AMERICA, SS:

To Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles, California, and To S. W. McNABB, his attorney,—GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of April, A. D. 1931, pursuant to an appeal allowed and filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain Habeas Corpus Proceeding wherein Foo Guey and Foo Wung are the appellants and you are appellee to show cause, if any there be, why the judgment, order and decree discharging the writ of habeas corpus and remanding the said Foo Guey and Foo Wung to the custody of Walter E. Carr in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

March 30, 1931

Wm. P. James
U. S. District Judge for the Southern District of California.

Receipt hereof acknowledged this 30th day of March, 1931.

Walter E. Carr
District Director of Immigration
By Harry B. Blee
Insp.

[Endorsed]: Original In the United States Circuit Court of Appeals for the Ninth Circuit Foo Guey and Foo Wung Appellants vs. Walter E. Carr, District Director of Immigration, Appellee Citation Filed Mar. 30, 1931. R. S. Zimmerman, Clerk by Edmund L. Smith, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
WITHIN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of the Application of)	
(	
FOO GUEY and FOO WUNG)	
(	No. 10029 J
For a Writ of Habeas Corpus)	
(	

PETITION FOR A WRIT OF HABEAS CORPUS

To the Honorable United States District Judge, now presiding in the United States District Court, in and for the Southern District of California, Central Division.

Your Petitioner Respectfully States:

–I–

That he was born in China, that he is a person of Chinese descent and of the Chinese race, and that he is a citizen of the Republic of China.

–II–

That he is lawfully domiciled in the United States of America, having been duly admitted thereto by the United States Immigration Authorities at and for the Port of San Francisco, California, July 26, 1881, and that he subsequently made several trips to China and was last admitted on or about November 30, 1919 as a returning domiciled Chinese merchant.

–III–

That he is and has been, ever since his said admission into the United States, a merchant by occupation, and that he has continuously been for more than one year last past, an active member of the co-partnership known

as and called the United Meat Market Company which is a firm engaged in buying and selling of merchandise at a fixed place of business, to-wit: No. 132 North Main Street, of Los Angeles, California, his cash investment therein being in excess of one thousand dollars ($1000.00); and that his mercantile status was investigated and conceded by the Inspector in Charge at the port of San Pedro, California.

–IV–

That Foo Guey and Foo Wung were born in China to your petitioner and his lawfully wedded wife in 1912 and 1914 respectively, and that he is the natural father of these boys in whose behalf this application is made.

–V–

That the said Foo Guey and Foo Wung departed from Hong Kong, China, on or about January 26, 1930, ex SS. "President McKinley" and upon their arrival at the port of San Pedro, California, on or about February 23, 1930, they made applications for admission as minor sons of a lawfully domiciled Chinese merchant under the provisions of the Chinese-America Treaty of Commerce and Immigration and the Acts of Congress enacted in pursuance thereof.

–VI–

That the applications of the said Foo Guey and Foo Wung for admission were thereupon heard by a Board of Special Inquiry which was convened on the 18th day of March, 1930, at San Pedro, California; that said applications were denied by the Immigration Board of Special Inquiry on the ground that relationship of father and sons between your petitioner and the said Foo Guey and Foo Wung was not satisfactorily established; and

thereupon an appeal was forthwith taken from the excluding decision to the Secretary of Labor with the result that the excluding decision of the said Board of Special Inquiry was affirmed, and Walter E. Carr as District Director of Immigration for the port of San Pedro, California, was ordered to hold the said Foo Guey and Foo Wung for deportation to China.

–VII–

That the said Foo Guey and Foo Wung are now being held in the custody of Walter E. Carr, District Director of Immigration, for the port of San Pedro, in the county of Los Angeles, State and Southern District of California, in the central division thereof, and that the said Walter E. Carr has given notice of his intention to deport the said Foo Guey and Foo Wung on the first available steamer.

–IX–

That the United States Immigration Service in ordering the Deportation of Foo Guey and Foo Wung and in holding them in custody so that their deportation may be effected, is acting in excess of the authority and power committed to them by the statutes in such cases made and provided for, and are therefore unlawfully confining, imprisoning and restraining the said Foo Guey and Foo Wung of their liberty in that they were denied a full and fair hearing of their applications to which they are entitled to have by law.

–X–

That the said Foo Guey and Foo Wung are in detention as aforesaid, and for that reason are unable to verify this petition upon and in their own behalf and for the said reason, this petition is verified by your petitioner for and

as the acts of the applicants, Foo Guey and Foo Wung, and upon his own behalf.

–XI–

That it is the intention of Walter E. Carr, District Director of Immigration, to deport the said Foo Guey and Foo Wung out of the United States and away from the land of which his father is a lawfully domiciled Chinese merchant and that unless this Honorable Court intervenes to prevent the said deportation, the said Foo Guey and Foo Wung will be deprived of residence within the country of their father's domicile;

WHEREFORE, your petitioner respectfully prays that a writ of habeas corpus issue herein as prayed for, directed to the Said Walter E. Carr District Director of Immigration and commanding him to hold the bodies of the said Foo Guey and Foo Wung before this Honorable Court at a time and place to be specified in the said writ, together with the time and cause of his detention, so that the same may be inquired into to the end that the said Foo Guey and Foo Wung may be restored of their liberty and go hence without day.

Dated this 12th day of May, 1930, at Los Angeles, Calif.

Y. C. Hong
Attorney for Petitioner.

STATE OF CALIFORNIA)
(SS.
COUNTY OF LOS ANGELES)

FOO FU, Being duly Sworn, Deposes and States that he is the petitioner named in the foregoing petition; that the same has been read and explained to him and that

he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters, he believes it to be true.

Foo Fu
Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME THIS 12TH OF MAY, 1930.

Y. C. Hong
[Seal] NOTARY PUBLIC

LET THE WRIT ISSUE as prayed for, returnable before the Honorable Wm. P. James, Judge of the U. S. District Court in and for the Southern District of California, Central Division, on the 26 day of May, 1930, at 2:15 o'clock in the afternoon.

Dated this 12th day of May, 1930, Los Angeles, Cal.

Wm. P. James
U. S. District Judge.

[Endorsed]: Original No. 10029 J United States District Court Southern District of California Central Division Foo Guey & Foo Wung Plaintiff vs. Walter E. Carr District Director of Immigration Defendant Petition for Writ of Habeas Corpus. Filed May 12, 1930. R. S. Zimmerman, Clerk. You Chung Hong Attorney at Law 510½ North Los Angeles St. Los Angeles, California MUtual 2709 Attorney for.....

IN THE UNITED STATES DISTRICT COURT
WITHIN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

****

THE PRESIDENT OF THE UNITED STATES OF AMERICA To: WALTER E. CARR, District Director of Immigration for the port of San Pedro, California, or Any Deputy or Officer Under his Supervision, Immigration District #31:	No. 10029 J

You are hereby commanded to have the body of FOO GUEY and FOO WUNG, who is by you held and restrained of their liberty, as it is said, together with the day and cause of their caption and detention, by whatever names the said FOO GUEY and FOO WUNG may be known or called, safely before the Honorable Wm. P. James, Judge of the United States District Court, within and for the Southern District of California, in the Central Division thereof, on the 26 day of May, 1930, at 2:15 o'clock in the afternoon of that day, at Los Angeles, California, to do and receive all and *singlar* those things which the said Judge shall then and there consider of you in this behalf.

And have you then and there this writ.

WITNESS, the Honorable Wm. P. James, Judge of the said court, at Los Angeles, California, this 12th day of May, 1930.

ATTEST, my hand and seal of said Court, the day and years last above writen.

R. S. ZIMMERMAN
[Seal] Clerk
W. E. Gridley
Deputy

RETURN ON SERVICE OF WRIT

United States of America)
) ss.
Southern District of California)

I hereby certify and return that I served the annexed Writ of Habeas Corpus on the therein-named Walter E. Carr, District Director of Immigration by handing to and leaving a true and correct copy thereof with Walter E. Carr, personally at Los Angeles, in said District on the 12 day of May, A. D. 1930.

A. C. Sittel
U. S. Marshal
By Kenneth McLean
Deputy.

[Endorsed]: Original. Marshal's Crim. Doc. No. 26340. Book 47 No. 10029 J. United States District Court, Southern District of California, Central Division. Foo Guey & Foo Wung, plaintiff, vs. Walter E. Carr, District Director of Immigration, defendant. Writ of Habeas Corpus. Filed May 12, 1930, at .....min past 4 o'clock P. M. R. S. Zimmerman, Clerk, W. E. Gridley, Deputy. You Chung Hong, attorney at law, 510½ North Los Angeles St. Los Angeles, California, MUtual 2709. Attorney for .....

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of	)	No. 10029-J
	)	
FOO GUEY and FOO WUNG	)	RETURN TO WRIT
	)	OF
For a Writ of Habeas Corpus	)	HABEAS CORPUS

I, Walter E. Carr, District Director of the United States Immigration District No. 31, at Los Angeles, California, in compliance with the Writ of Habeas Corpus issued herein, herewith present the bodies of Foo Guey and Foo Wung before this Honorable Court, and in making my return to the Writ of Habeas Corpus in the above case, admit, deny, and allege as follows:

I.

That Foo Guey and Foo Wung, in whose behalf Petition for the Writ was filed, hereinafter referred to as the Aliens, are citizens of China and of the Chinese race, and both arrived at the port of San Pedro, California, on the 23rd day of February, 1930, upon the Steamship "President McKinley", and applied for admission at San Pedro as the minor sons of Foo Fu, the later being a Chinese merchant lawfully domiciled in the United States. Thereafter the Aliens were examined by the Board of Special Inquiry of the United States Immigration Service at San Pedro. At the conclusion of said examination each of the Aliens was excluded from admission to the United States as having failed to establish his relationship to Foo Fu, the Board of Special Inquiry at San Pedro finding that Foo Guey and Foo Wung were aliens of a race ineligible

to citizenship and not exempted by any of the provisions of Section 13 (c) of the Immigration Act of 1924; as persons not in possession of unexpired immigration visas; and as persons of the Chinese race not in possession of duly visaed Section 6 certificates; and the Board further found that Foo Wung should be denied admission on the additional grounds that he was a person under 16 years of age not accompanied by or coming to join one or both parents; and that both applicants should be debarred as persons likely to become public charges.

Thereafter an appeal was filed in accordance with the provisions of the Immigration laws and the complete record of the proceeding held at San Pedro, California, was transmitted to the Secretary of Labor at Washington, D. C. The Aliens were represented before the Board of Review at the Department of Labor, Washington, D. C., by Counsel of that city. On or about the 10th day of May, 1930, the Secretary of Labor caused an order to be issued affirming the excluding decision of the Board of Special Inquiry at San Pedro, Respondent was preparing to deport the Aliens to China when this Habeas Corpus proceeding was instituted.

II.

Respondent admits the truth of allegation in paragraph numbered I of the Petition.

III.

Respondent admits the truth of allegation in paragraph numbered II of the Petition.

IV.

Respondent admits the truth of the allegation set forth in paragraph numbered III of the Petition.

V.

Respondent admits that the Aliens, Foo Guey and Foo Wung, were both born in China as set forth in paragraph numbered IV of the Petition, but denies the truth of each and every other allegation set forth in said paragraph of the Petition.

VI.

Respondent admits the truth of the allegation as set forth in paragraph numbered V of the Petition.

VII.

Respondent admits the truth of the allegations as set forth in paragraph numbered VI of the Petition.

VIII.

Respondent admits the truth of the allegations set forth in paragraph numbered VII of the Petition.

IX.

Respondent denies the truth of the allegations set forth in paragraph IX of the Petition.

X.

While admitting that it is the intention of Respondent to deport said Aliens, Foo Guey and Foo Wung, from the United States as alleged in paragraph numbered XI of the Petition, Respondent denies the truth of the allegation appearing in said paragraph of said Petition wherein it is alleged that the father of said Foo Guey and said Foo Wung is a lawfully domiciled Chinese merchant of the United States.

WHEREFORE, Respondent prays dismissal of said Writ of Habeas Corpus and further prays that the Aliens, Foo Guey and Foo Wung, in whose behalf said Writ was issued, be remanded to Respondent's custody for deportation in accordance with law.

WALTER E. CARR
Walter E. Carr
District Director
Respondent.

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

Walter E. Carr, District Director of the United States Immigration Service, District No. 31, being first duly sworn, deposes and says that he is the person who makes the foregoing Return; that he has read same and knows the contends thereof, and that same is true, except as to matters therein alleged on information and belief, and as to those matters that he believes it to be true.

WALTER E. CARR
(Walter E. Carr)

Subscribed and sworn to before me this 26 day of May, 1930.

R. S. ZIMMERMAN, Clerk U. S. District Court
[Seal] Southern District of California
By M. L. Gaines Deputy

[Endorsed]: No. 10029-J In the District Court of the United States for the Southern District of California (Central Division In the Matter of Foo Guey and Foo Wung for a Writ of Habeas Corpus Return to Writ of Habeas Corpus Rec'd copy of this return Y. C. Hong Atty for Petitioner Mav 26 1930. Filed May 26 1930 R. S. Zimmerman, Clerk By Murray E. Wire, Deputy Clerk

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At a stated term, to wit: The February Term, A. D. 1931, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Wednesday the 4th day of March in the year of our Lord one thousand nine hundred and thirty-one

Present:

The Honorable William P. James, District Judge.

In the Matter of the Petition of	)	
	)	
FOO GUEY AND FOO WONG	)	No. 10029-J-Crim.
	)	
	)	
for a Writ of Habeas Corpus.	)	

This matter having heretofore been heard by the Court, and counsel having argued the cause and submitted written briefs, and the Court having duly considered the same, and now being fully advised, hands down its written opinion and orders that the Petition be discharged, and the Chinese persons, Foo Guey and Foo Wong, remanded into the custody of the Immigration Officers for deportation in accordance with the warrant issued by the Secretary of Labor. Opinion filed.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF	)	
	(	No. 10029-J
FOO GUEY and FOO WUNG	)	

MEMORANDUM OPINION

This proceeding is brought by Foo Fu, a native of China, who has the status of a merchant regularly domiciled in the United States. It is prosecuted on behalf of Foo Guey and Foo Wung, who were refused entry to the United States as not having established that they were the sons of petitioner. Foo Guey is, as near as can be

ascertained, about the age of eighteen years, and Foo Wung about the age of fifteen years. The two latter testified before the local examining board, as did the alleged father, and also Foo Wai, a son who was admitted in the year 1922.

The case presented is the quite usual one where the immigration officers have determined that the testimony as to the relationship of the persons demanding entry and their witnesses is insufficient to establish the relationship claimed. In administering this law, the immigration officers labor under great difficulty in disproving the claims of the Chinese persons. If they were compelled to accept the flat sworn statements of the alleged parent and his alleged offspring, there would be little chance that the restrictions of the law would be observed at all. Necessarily the officers of the Immigration Department are obliged to rely upon discrepancies shown in the testimony produced by the demanding persons, for they are not furnished with any sort of certification as to birth or parentage originating from official sources in China. The proposed entrant has the burden of satisfying the Immigration Department that he is lawfully entitled to come into the country. The courts have no function to weigh the testimony heard on proceedings like this, for Congress has established the tribunal, to-wit: the Labor Department, which has the exclusive right to determine the facts and to order deportation.

The discrepancies in the testimony of the witnesses, as heard before the examining board, consist in part in the differences in the statement of the years of the birth of the minor Chinese, as given by the alleged father in 1919, when he made a trip to China, and in 1922 when he testi-

fied upon the admission of Foo Wai. There was shown a great lack of agreement between the testimony of the Chinese minors and that given by the father at a prior time as to the number of the houses in the Chinese village from which they came, and the names of persons there living. These discrepancies are set forth in the decision of the Board of Review to which the case was appealed, and they need not be here further stated.

The examination had by the local board was certainly fair; no obstacle was placed in the way to prevent the various witnesses from stating fully the truth respecting the matters under investigation. There appears to have been no such hurrying of the proceeding as to prevent the witnesses from fully considering the answers given by them, and a competent interpreter was present to see that all matters inquired into were properly understood.

I am not able to conclude that the decision of the immigration officers in this case was arbitrarily made as not being supported by some substantial evidence.

The petition is discharged and the Chinese persons, Foo Guey and Foo Wung, are remanded to the custody of the immigration officers for deportation in accordance with the warrant issued by the Secretary of Labor.

Dated March 4, 1931.

Wm. P. James
U. S. District Judge.

[Endorsed]: No. 10029-J. U. S. District Court Southern District of California In the Matter of Foo Guey and Foo Wung Memorandum Opinion Filed Mar 4, 1931. R. S. Zimmerman, Clerk, By B. B .Hansen, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

* * * * * * *

In the Matter of the Applications of)	
(	No. 10029-J
FOO GUEY and FOO WUNG)	NOTICE OF
(	APPEAL
For a Writ of Habeas Corpus)	
(	

* * * * * * * * * *

To WALTER E. CARR, District Director of Immigration, Respondent, and to S. W. McNabb, United States Attorney, Attorney for Respondent:

You, and each of you, will please take notice that the petitioners, Foo Guey and Foo Wung, in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order remanding said Foo Guey and Foo Wung to the custody of said Walter E. Carr, entered in the above entitled cause on the 4th day of March, 1931, and that the certified transcript of record will be filed in the said Appellate Court within thirty (30) days from the filing of this notice.

Dated this 17th day of March, 1931.

Y. C. Hong
Y. C. HONG
Attorney for Petitioners

[Endorsed]: Original No. 10029-J United States District Court Southern District of California Central Division. Foo Guey and Foo Wung vs. Walter E. Carr District Director of Immigration Notice of Appeal. Received copy of the within this 21 day of March, 193 . S. W. McNabb, W. G. Balter Attorney for Carr Filed Mar. 30, 1931. R. S. Zimmerman, Clerk, By L. B. Figg, Deputy Clerk You Chung Hong, attorney at law 741½ North Alameda Street, Los Angeles, California, MUtual 2709. Attorney for .....

IN THE UNITED STATES DISTRICT COURT FOR AND IN THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

In the Matter of the Applications of	)	No. 10029-J
	)	
FOO GUEY and FOO WUNG	)	Petition for Appeal
	)	
For a Writ of Habeas Corpus	)	

Come now Foo Guey and Foo Wung, the Petitioners in the above-entitled cause, and respectfully show:

That on the 4th day of March, 1931, the above-entitled court made and entered its order denying the petition for a Writ of Habeas Corpus, as prayed for, on file herein, in which the said order in the above-entitled cause certain errors were made to the prejudice of the petitioners herein, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore the petitioners pray that an appeal may be granted in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit in order that the errors as complained of may be corrected, and further, that a transcript of the record, proceedings, and papers, in the above-entitled cause, as shown by the praecipe, duly authenticated may be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and further that the said petitioners be permitted to remain at large in accordance with the provisions and terms of the bail bond or recognizance executed to the United States of America in the sum of One Thousand Dollars ($1000.00) each, by the Union Indemnity Company, on May 28th, 1930, during the pendency of the appeal herein, so that they might be produced in execution of whatever judgment may be finally entered herein.

Dated at Los Angeles, California, March 17th, 1931.

Y. C. Hong
Y. C. HONG
Attorney for Petitioners.

[Endorsed]: Original. No. 10029-J. United States District Court, Southern District of California, Central Division. Foo Guey and Foo Wung vs. Walter E. Carr, District Director of Immigration. Petition for Appeal. Received copy of the within this 30th day of March, 1931 Milo E. Rowell, Asst U. S. Atty. Filed Mar. 30, 1931. R. S. Zimmerman, Clerk by L. B. Figg, Deputy Clerk. You Chung Hong, attorney at law 741½ North Alameda Street Los Angeles, California, MUtual 2709. Attorney for .....

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of the Applications of)	
(	No. 10029-J
FOO GUEY and FOO WUNG)	
(	Assignment of
For a Writ of Habeas Corpus)	Errors
(	
)	

* * * * * * * * * *

NOW COME THE PETITIONERS, Foo Guey and Foo Wung, through their attorney, Y. C. Hong, Esq., and set forth the errors they claim the above entitled Court committed in denying their petition for a writ of habeas corpus, as follows:

–I–

That the Court erred in holding that in administering the law, the immigration officers are required to disprove the claims of Chinese person to their right of admission to the United States;

–II–

That the Court erred in holding that the restrictions of the law are applicable to Chinese persons of the petitioners' class:

–III–

That the Court erred in holding that the alleged discrepancies in the statements of the various witnesses herein constituted sufficient and substantial ground for the exclusion of the petitioners;

–IV–

That the Court erred in holding that the hearing accorded the petitioners and their witnesses by the immi-

gration officers was complete, full, and fair in every respect;

–V–

That the Court erred in holding that the examination accorded the petitioners and their witnesses was not arbitrary and that there was no abuse of discretion and powers on the part of the immigration officers;

–VI–

That the Court erred in holding that findings of the Board of Special Inquiry and the decision of the Board of Review should not be set aside and declared null and void; and

–VII–

That the Court erred in not granting the writ of habeas corpus and discharging the petitioners from the custody and control of Walter E. Carr, District Director of Immigration at the port of San Pedro, California;

WHEREFORE, the petitioners pray that the said Order and Judgment of the United States District Court in and for the Southern District of California, Central Division, made, given and entered herein in office of the Clerk of the said Court on the 4th day of March, 1931, denying the petition for a writ of habeas corpus, be REVERSED and that the said Foo Guey and Foo Wung, be restored to their liberty and go hence without day.

Dated at Los Angeles, California, this 24th day of March, 1931.

Y. C. Hong
(Y. C. Hong)
Attorney for Petitioners

[Endorsed]: Original No. 10029-J United States District Court Southern District of California Central Division Foo Guey and Foo Wung vs. Walter E. Carr District Director of Immigration Assignment of Errors. Received copy of the within this 30th day of March 1931 Milo E. Rowell Asst U. S. Atty Filed Mar. 30, 1931. R. S. Zimmerman, Clerk, by L. B. Figg, Deputy Clerk You Chung Hong Attorney at Law 741½ North Alameda Street Los Angeles, California MUtual 2709 Attorney for .....

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of the Applications of)	
(	No. 10029-J
FOO GUEY and FOO WUNG)	
(	ORDER
For a Writ of Habeas Corpus)	ALLOWING
(	APPEAL
)	

* * * * * * * * * * *

It appearing to this court that Foo Guey and Foo Wung, the petitioners herein, *has* this day filed and presented to the above court their petition praying for an order to allow an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and order of this court denying a writ of habeas corpus herein and dismissing their petition for the said writ, and good cause appearing therefor,

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled court make and prepare a transcript of all the papers, proceedings and records in the above-entitled cause and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and,

IT IS ALSO ORDERED that the execution of the warrants of deportation of the said Foo Guey and Foo Wung be and they are hereby permitted to remain at large in accordance with the provisions and terms of the recognizance executed by the Union Indemnity Company, a corporation of Los Angeles, California, on the 18th day of March, 1931, pending the final decision of this appeal.

Dated at Los Angeles, California, this 21 day of March, 1931.

Wm. P. James,
United States District Judge

[Endorsed]: Original No. 10029-J United States District Court Southern District of California Central Division. Foo Guey and Foo Wung vs. Walter E. Carr District Director of Immigration Order Allowing Appeal Received copy of the within this 21 day of Mar. 1931. S. W. McNabb, H. G. Balter Attorney for Carr Filed Mar. 30, 1931. R. S. Zimmerman, Clerk, By L. B. Figg, Deputy Clerk. You Chung Hong Attorney at Law 741½ North Alameda Street Los Angeles, California MUtual 2709 Attorney for .....

IN THE UNITED STATES DISTRICT COURT
WITHIN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of	)	No. 10029-J
	(	
FOO GUEY and FOO WUNG	)	Stipulation Regard-
	(	ing Original Rec-
On Habeas Corpus	)	ords and Files of
	(	Department of
	)	Labor.

IT IS HEREBY STIPULATED AND AGREED by and between Y. C. Hong, Attorney for Foo Guey and Foo Wung, Appellants, and S. W. McNabb, Attorney for Walter E. Carr, Appellee, that the original files and records of the United States Department of Labor covering the application of the petitioners, Foo Guey and Foo Wung, for admission to the United States, which were filed in the hearing in the above entitled cause, may be by the Clerk of this Court sent up to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, as part of the Appellate record, in order that the said Circuit Court of Appeals for the Ninth Circuit in lieu of a certified copy of said records and files and that said original records may be transmitted as part of the Appellate record.

Dated this 30th day of March, 1931.

Y. C. HONG
(Y. C. Hong)

SAMUEL W. McNABB Attorney for Appellant
By Milo E. Rowell
(S. W. McNABB)
Asst. United States Attorney

[Endorsed]: Original No. 10029-J United States District Court Southern District of California Central Division Foo Guey and Foo Wung vs. Walter E. Carr District Director of Immigration Stipulation Regarding Original Records and Files of Department of Labor Filed Mar 30 1931 R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk You Chung Hong Attorney at Law 741½ North Alameda Street Los Angeles, California MUtual 2709 Attorney for .....

IN THE UNITED STATES DISTRICT COURT
WITHIN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

* * * * * *

In the Matter of the Applications of)	
(	No. 10029-J
FOO GUEY and FOO WUNG)	
(	Order for Transmis-
For a Writ of Habeas Corpus)	sion of Original
(	Exhibits
)	

* * * * * * * * *

ON STIPULATION OF COUNSELS, it is by this Court ordered that the original records and files of the above-entitled cause in the United States Immigration Office filed herein on the return of the Respondent, Walter E. Carr, District Director of Immigration, to the writ of Habeas Corpus, be transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, as original exhibits in lieu of a certified copy of the said records and files, and that the same need not be printed.

Dated this 1st day of April, 1931, at Los Angeles, California.

Wm. P. James,
United States District Judge

[Endorsed]: Original No. 10029-J United States District Court Southern District of California Central Division Foo Guey and Foo Wung vs. Walter E. Carr District Director of Immigration Order for Transmission of Original Exhibits. Filed Apr. 1, 1931. R. S. Zimmerman Clerk, By F. Betz Deputy Clerk You Chung Hong Attorney at Law 741½ North Alameda Street Los Angeles, California MUtual 2709 Attorney for .....

IN THE UNITED STATES DISTRICT COURT
WITHIN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Approved Mch. 21, 1931 Wm P James Dist J.

In the Matter of	
FOO GUEY and FOO WUNG	No. 10029-J
On Habeas Corpus	COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENT:

That the undersigned, UNION INDEMNITY COMPANY, is held and firmly bound unto the United States of America, in the full and just sum of two Hundred and Fifth Dollars ($250.00), to be paid to the United States of America, or their attorney, executors, administrators

or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jo*int*ly and severally by these presents.

SEALED with our seals and dated this 18th day of March, 1931.

WHEREAS, lately the District Court of the United States, for the Southern District of California, Central Division, in a habeas corpus proceeding in the said Court between the petitioners, Foo Guey and Foo Wung, and the respondent, Walter E. Carr, District Director of Immigration as aforesaid, wherein an order, judgment and decree was rendered against the said Foo Guey and Foo Wung discharged the writ of habeas corpus and remanding the said petitioners, Foo Guey and Foo Wung, to the custody of respondent, Walter E. Carr; and the said Foo Guey and Foo Wung having obtained from the said Court an appeal to reverse the said order, judgment and decree in the aforesaid habeas corpus proceeding, and a Citation directed to the said Walter E. Carr, District Director of Immigration as aforesaid, citing and admonishing him to be and appear at the United States Circuit of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California, on the.....day of....., 1931.

NOW, the condition of the above obligation is such that if the said Foo Guey and Foo Wung shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the obligation to be void; otherwise to remain in full force and virtue.

UNION INDEMNITY COMPANY

[Seal] By William M. Curran

Attorney-in-fact

STATE OF CALIFORNIA }
} SS.
COUNTY OF Los Angeles }

On this 18th day of March, in the year one thousand nine hundred and Thirty-one before me, BLANCHE CALLAHAN, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared WILLIAM M. CURRAN, known to me to be the duly authorized Attorney-in-fact of the UNION INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said WILLIAM M. CURRAN duly acknowledged to me that he subscribed the name of the UNION INDEMNITY COMPANY thereto as Surety and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Blanche Callahan
Notary Public in and for County,
STATE OF CALIFORNIA

[Seal]

[Endorsed]: Original No. 10029-J United States District Court Southern District of California Central Division Foo Guey and Foo Wung vs. Walter E. Carr District Director of Immigration Cost Bond on Appeal. Filed Mar. 30, 1931 R. S. Zimmerman, Clerk, By L. B. Figg Deputy Clerk. You Chung Hong Attorney at Law 741½ North Alameda Street Los Angeles, California MUtual 2709 Attorney for .....

IN THE UNITED STATES DISTRICT COURT
WITHIN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of the Application of)	
(	No. 10029 J
FOO GUEY and FOO WUNG)	
(	Bail Bond
For a Writ of Habeas Corpus.)	
(	

* * * * * * * * * * *

KNOW ALL MEN BY THESE PRESENTS:

THAT the undersigned, UNION INDEMNITY COMPANY, is held and firmly bound unto the United States of America, in the full and just sum of ONE THOUSAND DOLLARS ($1,000.00), to be paid to the United States of America, or their certain attorney, executors, administrators or assigns; and to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

SEALED with our seals and dated this 28th day of May, 1930.

WHEREAS, on or about the 12th day of May, 1930, the Secretary of Labor, in an appeal submitted, on behalf of FOO WUNG, from the decision of the Board of Special Inquiry at the port of San Pedro, California, to the said Secretary's Board of Review, rendered an order against the appellant, FOO WUNG, dismissing his said appeal and directing Walter E. Carr, District Director of Immigration District No. 31, to deport him from the United States to China; and that thereupon, a petition

was made to the United States District Court in and for the Southern District of California, Central Division, for a writ of habeas corpus to review the hearing had before the U. S. Immigration Department in connection with the application of the said FOO WUNG for admission,

NOW, the condition of the above obligation is such that if the said Order, Judgment or Decree of the Secretary of Labor be affirmed, the said FOO WUNG will surrender himself to Walter E. Carr, District Director of Immigration, as aforesaid then this recognizance to be void, otherwise, to remain in full force and virtue.

UNION INDEMNITY COMPANY

[Seal] By William M. Curran
Attorney in Fact.

IN CONSIDERATION for the stipulations cited above, I do hereby promise and agree to appear personally before the United States District Court in and for the Southern District of California, Central Division, and answer to the Order, Judgment or Decree of the said United States District Court as aforesaid.

(Sign) [Chinese Characters]
FOO WUNG – Principal

STATE OF CALIFORNIA)
(SS.
COUNTY OF LOS ANGELES)

On this 28th day of May, before me, Blanche Callahan a NOTARY PUBLIC in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared William M. Curran, known to me to be the duly authorized attorney in fact of

the UNION INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the attorney in fact of the said company, and the said William M. Curran duly ACKNOWLEDGED to me that he subscribed the name of the UNION INDEMNITY COMPANY thereto as surety, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Blanche Callahan
NOTARY PUBLIC
In and for Los Angeles County
State of California.

[Seal]

I hereby approve the foregoing bond
Dated the 29 day of May, 1930

Wm. P. James
Judge

[Endorsed]: Original No. 10029 J United States District Court Southern District of California Central Division Foo Guey & Foo Wung Plaintiff vs. Walter E. Carr Defendant Bail Bond Received copy of the within this 29 day of May, 1930 S. W. McNabb Attorney for Defdt Filed May 29, 1930 R. S. Zimmerman, Clerk, By W. E. Gridley Deputy Clerk. You Chung Hong Attorney at Law 510½ North Los Angeles St. Los Angeles, California MUtual 2709 Attorney for.....

IN THE UNITED STATES DISTRICT COURT
WITHIN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of the Application of)	
(	No. 10029 J
FOO GUEY and Foo Wung,)	
(	Bail Bond
For a Writ of Habeas Corpus.)	
(	

KNOW ALL MEN BY THESE PRESENTS:

THAT the undersigned, UNION INDEMNITY COMPANY, is held and firmly bound unto the United States of America, in the full and just sum of ONE THOUSAND DOLLARS ($1,000.00), to be paid to the United States of America, or their certain attorney, executors, administrators or assigns; and to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

SEALED with our seals and dated this 28th day of May, 1930.

WHEREAS, on or about the 12th day of May, 1930, the Secretary of Labor, in an appeal submitted, on behalf of FOO GUEY, from the decision of the Board of Special Inquiry at the port of San Pedro, California, to the said Secretary's Board of Review, rendered an order against the appellant, FOO GUEY, dismissing his said appeal and directing Walter E. Carr, District Director of Immigration District No. 31, to deport him from the United States to China; and that thereupon, a petition was made to the United States District Court in and for the Southern

District of California, Central Division, for a writ of habeas corpus to review the hearing had before the U. S. Immigration Department in connection with the application of the said FOO GUEY for admission,

NOW, the condition of the above obligation is such that if the said Order, Judgment or Decree of the Secretary of Labor be affirmed, the said FOO GUEY will surrender himself to Walter E. Carr, District Director of Immigration, as aforesaid, then this recognizance to be void, otherwise, to remain in full force and virtue.

UNION INDEMNITY COMPANY

[Seal] By WILLIAM M. CURRAN
Attorney in Fact.

IN CONSIDERATION for the stipulations cited above, I do hereby promise and agree to appear personally before the United States District Court in and for the Southern District of California, Central Division, and answer to the Order, Judgment or Decree of the said United States District Court as aforesaid.

[Chinese Characters]

FOO GUEY – Principal

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES,)

On this 28th day of May, in the vear one thousand nine hundred and Thirty before me, BLANCHE CALLAHAN, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared WILLIAM M. CURRAN known to me to

be the duly authorized Attorney-in-fact of the UNION INDEMNITY COMPANY and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said WILLIAM M. CURRAN duly acknowledged to me that he subscribed the name of the UNION INDEMNITY COMPANY thereto as Surety and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] BLANCHE CALLAHAN
Notary Public in and for Los Angeles, County, State of California

I hereby approve the foregoing bond.
Dated the 29 day of May 1930
Wm. P. James, Judge

[Endorsed]: Original No. 10029 J Dept..... United States District Court Southern District of California Central Division Foo Guey & Foo Wung Plaintiff vs. Walter E. Carr Defendant Bail Bond Received copy of the within ..... this 29 day of May, 1930 S. W. McNabb Attorney for Defdt. Filed May 29 1930 R. S. Zimmerman, Clerk By W. E. Gridley Deputy Clerk You Chung Hong Attorney at Law 510½ North Los Angeles St. Los Angeles, California MUtual 2709 Attorney for .....

IN THE UNITED STATES DISTRICT COURT
WITHIN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of	)	No. 10029-J
	(	
FOO GUEY and FOO WUNG	)	Praecipe For Tran-
	(	script of Record
On Habeas Corpus	)	on Appeal
	(	

TO THE CLERK OF THE SAID COURT:

Please prepare and duly authenticate the transcript and the following portions of the record in the above entitled cases for appeal of said appellants heretofore allowed, to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for Writ of Habeas Corpus and Order granting the Writ;
2. Writ of Habeas Corpus;
3. Return to Writ of Habeas Corpus;
4. Order discharging Writ of Habeas Corpus;
5. Notice of Appeal;
6. Petition for Appeal;
7. Assignment of Errors;
8. Order Allowing and Fixing Bond Thereon;
9. Cost Bond on Appeal and Court's Approval;
10. Bail Bonds and the Court's Approval of Same;
11. Citation;
12. Stipulation;

13. Order for transmission of Original Exhibits; and,

14. This praecipe.

March 26th, 1931.

Y. C. Hong

(Y. C. Hong)

Attorney for Petitioners & Appellant

[Endorsed]: Original No. 10029-J United States District Court Southern District of California Central Division Foo Guey and Foo Wung vs. Walter E. Carr District Director of Immigration Praecipe for Transcript of Record on Appeal. Received copy of the within this 30th day of March 1931 Milo E. Rowell Asst U. S. Atty Filed Mar. 30, 1931. R. S. Zimmerman, Clerk, By L. B. Figg Deputy Clerk. You Chung Hong Attorney at Law 741½ North Alameda Street Los Angeles, California MUtual 2709 Attorney for .....

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of FOO GUEY and FOO WUNG On Habeas Corpus	CLERK'S CERTIFICATE

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 36 pages, numbered from 1 to 36, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; petition for writ of habeas corpus; order granting writ of habeas corpus; writ of habeas corpus; return to writ of habeas corpus; minute order discharging writ of habeas corpus; opinion; notice of appeal; petition for appeal; assignment of errors; order allowing appeal; stipulation regarding original records and files of Department of Labor; order for transmission of original exhibits; cost bond on appeal; bail bonds, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of April in the year of Our Lord One Thousand Nine Hundred and Thirty-one, and of our Independence the One Hundred and Fifty-fifth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6445.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Application of FOO GUEY and FOO WUNG, For a Writ of Habeas Corpus.

Foo Guey and Foo Wung,
Appellants,

vs.

Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles, California.
Appellee.

BRIEF IN BEHALF OF APPELLANTS.

You Chung Hong
741½ North Alameda St., Los Angeles, Cal.
Attorney for Appellants

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 6445.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Application of FOO GUEY and FOO WUNG, For a Writ of Habeas Corpus.

Foo Guey and Foo Wung,
Appellants,

vs.

Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles, California.
Appellee.

BRIEF IN BEHALF OF APPELLANTS.

STATEMENT OF THE CASE.

This appeal is taken from the order of the District Court for the Southern District of California, Central Division, denying the petition for a writ of habeas corpus [Tr. of R. pp. 13-14]. A memorandum opinion was rendered by the court below [Tr. of R. pp. 14-16].

The proceeding arose in the court below by the presentation in behalf of the appellants, by their father, Foo Fu,

of a petition for a writ of habeas corpus [Tr. of R. pp. 3-7], asking their discharge from the custody of Walter E. Carr, as District Director of Immigration for the port of San Pedro, the respondent in the court below and the appellee herein.

FACTS OF THE CASE.

The appellants herein sought admission to the United States at the port of San Pedro on March 18, 1930, as members of the mercantile class of Chinese, to wit, the minor sons of the lawfully domiciled Chinese merchant, Foo Fu. The lawfulness of the presence in the United States of the said Foo Fu, and the fact that he is a merchant, to wit, a person engaged in the buying and selling of merchandise at a fixed place of business, were conclusively proved and, of course, conceded by the immigration authorities. Appellants sought admission pursuant to the treaty with China of 1880 (22 Stat. L. 826) and the laws passed in execution of such treaty, commonly called the Chinese exclusion laws (22 Stat. L. 58; 23 Stat. L. 115; 25 Stat. L. 476; 27 Stat. L. 25; 28 Stat. L. 7; 32 Stat. L., Part I, 176; 33 Stat. L. 394, 428), as that treaty and those laws have been construed by the Supreme Court of the United States (*United States v. Gue Lim,* 176 U. S. 459, 44 L. Ed. 544; *Cheung Sun Shee v. Nagle,* 268 U. S. 336, 69 L. Ed. 985).

By stipulation [Tr. of R. p. 24] the original files and records of the United States Department of Labor covering the application of appellants for admission to the United States are to be by the clerk of the District Court sent up to the clerk of this court, as part of the record on

appeal. In discussing the various pertinent details of this case references will, accordingly, be made herein to the transcript of the administrative examination accorded appellants and their witnesses by the Immigration Board of Special Inquiry at San Pedro on March 18, 1930, to which reference will be made as "Transcript of Department Record" [Tr. Dept. R.].

At the conclusion of the administrative hearing, a member of the Board (the Chairman and the other member concurring) moved "that the appellants, Foo Guey and Foo Wung, having failed to establish their relationship as claimed, be debarred as aliens of a race ineligible to citizenship and not exempted by any of the provisions of Section 13 (c) of the Immigration Act of 1924; as persons not in possession of unexpired immigration visas; and as persons of the Chinese race not in possession of duly visaed Section 6 certificates; and that Foo Wung be denied admission on the additional grounds that he is a person under sixteen years of age not accompanied by or coming to join one or both parents; and that both applicants be debarred as persons likely to become public charges." [Tr. Dept. R. p. 23.]

It will be noted, however, that none of the stated grounds for exclusion would, or could, have been maintained by the Board of Special Inquiry otherwise than upon the stated belief and conclusion of the members of such Board that the two applicants (appellants) had "failed to establish their relationship" to the lawfully domiciled merchant, Foo Fu. Therefore, the only question really involved in the case was that of such relationship.

An appeal to the Secretary of Labor was taken from the excluding decision rendered by the Board of Special Inquiry, and on 1930, such appeal was dismissed by said Department, and the decision of the Board at San Pedro affirmed, for reasons stated in a memorandum prepared by the Board of Review in the office of the Secretary of Labor (Department record No. 55704/782, memorandum on blue sheet, bearing date last stated).

Thereupon the writ of habeas corpus which carried the case before the District Court was applied for, on the ground stated in Paragraph IX of the petition [Tr. of R. p. 5], to wit, that the immigration officials in ordering deportation had acted in excess of the authority and power committed to them by the statutes, that the appellants had been denied the full and fair hearing to which entitled under the law, and that, therefore, the appellants were being unlawfully confined, imprisoned and restrained.

As will be seen when the transcript of the administrative hearing is read, the appellants were, respectively, examined at great length with regard to matters affecting themselves and various members of their family and with regard to the village in China from which they claim to come; that they were asked very few questions with regard to the house in which they and the other members of their family have lived, or with regard to the domestic arrangements and customs of the family; and that their father and their older brother (admitted to the United States in 1922) were asked no questions with regard to the village; and that neither appellants nor either of their witnesses was cross-examined or afforded any opportunity to explain supposed disagreements in their testimony as

compared with that of the others, and that this applied particularly to questions answers to which were descriptive of the village as the father last knew it in 1919 and as the brother knew it in 1922.

It will be observed also that the excluding decision and the order to deport were based to a very considerable extent upon "discrepancies" between the descriptions of the village as the village existed more than eight years previously and the descriptions given of it by the appellants, respectively, and covering it at the time of their then very recent departure from such village.

QUESTIONS INVOLVED.

As already seen, the one point fundamentally at issue in the case, as resulting from the application of appellants for admission to the United States, was their relationship to the alleged father; for both their minority and the mercantile status of such father were conclusively proved and conceded.

It is conceived, as the matter now comes before this Honorable Court, the inquiry should be directed to determining whether or not the hearing conducted by the immigration officials was fair, and whether or not the conclusions of those officials were supported by substantial evidence or were simply arbitrary and in abuse of the discretion conferred upon such officials by law.

ARGUMENT.

I.

The Hearing Conducted by the Immigration Officials Was Unfair Because It Did Not Afford Appellants and Their Interested Relatives (Father and Brother) a Full and Complete Opportunity to Testify on Material Matters.

In order that fairness may obtain in an administrative hearing such as that here and now under review, the course pursued by the immigration officials should constitute "a fair investigation" (*Low Wah Suey v. Backus,* 225 U. S. 460, 56 L. Ed. 1165); the authority of the immigration officials should be "fairly exercised, that is consistently with the fundamental principles of justice embraced within the conception of due process of law" (*Tang Tun v. Edsell,* 223 U. S. 673, 56 L. Ed. 606); and however summary such hearing may be in form it must be one conducted "in good faith" (*Chin Yow v. U. S.,* 208 U. S. 8, 52 L. Ed. 369); and, in order to constitute a basis for an adverse decision, such hearing must produce evidence adequate to support such finding (*Zakonaite v. Wolf,* 226 U. S. 272, 57 L. Ed. 218); and—of the utmost importance—the hearing must be one in which the power delegated by Congress to immigration officials is "administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race." *Kwock Jan Fat v. White,* 253 U. S. 454, 458, 464, 64 L. Ed. 1010, 1012, 1014.

The record discloses substantial agreement between the four parties whose testimony was taken with regard to

the main items of information concerning the family to which such parties claim to belong. This substantially agreeing testimony upon material points lays a substantial basis for the belief that the claim of relationship advanced in this case is true. *Gung You v. Nagle*, 34 Fed. (2d) 848; *Hom Chung v. Nagle*, 41 Fed. (2d) 126, both decided by this Honorable Court.

Although the Board of Special Inquiry at San Pedro set up categorically twenty-two items with regard to applicant Foo Guey and eighteen items with regard to applicant Foo Wung [Tr. Dept. R. pp. 20-22], which such Board designated as discrepancies supporting its decision adverse to appellants, when the case came before the Department of Labor for review the Department found itself obliged to concede that almost all of these enumerated discrepancies could "be explained away as due to errors in memory." In affirming the decision of the San Pedro Board and ordering deportation the Department of Labor based its decision upon the three propositions now herein taken up for discussion.

In 1919, when the father returned from a visit to China, and more particularly in 1922, when the older brother of appellants applied for admission and was admitted, answers were recorded to certain questions with regard to the village in which the family lived in China; and, when appellants were examined at San Pedro the questions asked "closely follow" those propounded on the previous occasions [Tr. Dept. R. p. 19]—that is, the questions asked appellants, for no questions dealing with the description of the village were asked either the father or the brother.

Even in China, and especially there since the establishment of the Republic, and the resulting stirring up of the people and the creating among them of a spirit of restlessness theretofore unknown in that ancient and conservative country, many changes can take place in any community, urban, suburban, or rural, in the course of eight or more years; indeed, important or even revolutionary changes may occur over night. Obviously, therefore, it was not fair, simply upon the face of things, for the immigration officials to use, as a comparison-basis against the testimony of appellants' statements which had been made with regard to this village by their father and brother eight or more years ago. The said two relatives should have again been examined—not because they could possibly have claimed or shown any personal knowledge of changes in the village, but because it is reasonable to believe that, in the natural course of events, they would have learned from the members of the family in China of at least some of these changes, if such changes had actually occurred, and because they were entitled to an opportunity of this kind to make an explanation if they could possibly do so.

There is another reason of the utmost importance which the immigration inspectors, *in whose hands exclusively were both the opportunity and the method of developing the facts,* should have questioned the father and brother currently with regard to the village. There is no absolute certainty that the 1919 and the 1922 records are correct in what they purport to show with regard to the statements then made by these witnesses concerning the village. As was pointed out by District Judge Dietrich of the Western

District of Washington, in *Ex parte Cheung Tung,* 292 Fed. 997, 1000, testimony in Chinese cases is always taken under circumstances rendering mistakes highly probable—errors of interpretation, of transcription, of inadvertence or misunderstanding—errors which often there is no opportunity to correct and which become perpetuated for that reason.

The transcript of the administrative hearing in the case now under consideration carries within itself several signifiant illustrations of how easy it is for misunderstanding to arise on a matter of this kind. On page 1 of such transcript appellants' father is recorded as stating "I was born in the Nam Hoy Gow Kong District, in the Sai Juey village." On page 3 he is shown to have stated that appellants had been attending school in Sar Juey village, whereupon these questions and answers were put down:

> "Q. Of what city is the Sar Juey village a part? A. It is part of the Gow Gong District.
>
> Q. Is Gow Gong a city? A. No.
>
> Q. You stated in 1919 that Sar Juey was a portion of Gow Gong city? A. Gow Gong market, not Gow Gong city.
>
> Q. Then why did you say it was part of the Gow Gong city, you had just come from there? A. There is the Gow Gong District and in that is the Gow Gong market, maybe they misunderstood me and thought I said Gow Gong city.
>
> Q. You further said that you were born in the Gow Gong City and didn't mention the market. A. I was born in the Gow Gong market, Sar Juey village.
>
> Q. You said that you were born in the Gow Gong city, N. H. dist.? A. I was born in the Sar Juey village in the Gow Gong dist."

On page 4 appellants' brother is recorded as stating: "I was born in the Sar Juey village, Gow Gong Nam Hop Dist., China," and then these questions and answers were put down:

> "Q. How does it come that you give a different place of birth now from that you gave when you were admitted in 1922? A. Gow Gong Sar Juey Fook Lay.
>
> Q. What is the name of your village? A. The Sun Fook Lay.
>
> Q. Then why did you call it something else a while ago? A. They call it Sar Juey or the Sun Fook Lay.
>
> Q. What is it commonly known as? A. Sar Juey village.
>
> Q. Then why did you say in 1922 that you were born in the Gow Gong village Sun Fook Ley subdivision, Nam Hoy Dist.? A. I didn't say that."

Any one at all familiar with the geographical and political divisions of Kwong Tung Province, China, knows that Nam Hoy (not Hop) is one of the numerous districts (heins), corresponding substantially to the county divisions of our states, into which the said province is divided. Obviously the father could not have said in the present hearing that he was born in "Nam Hoy Gow Kong District," for there is no such district. Obviously, also, he did not state, as he is recorded as stating on page 3, that there is "the Gow Gong District." Undoubtedly what he said was that there is a subdivision of Nam Hoy District known as Gow Gong, and there is a market in that subdivision also known as Gow Gong. Quite as clearly, he did not say in 1919 that he was born in Gow Gong city, there being no such city in that part of China. So that both the 1919

record and the present record are inaccurate in that regard. Just as obviously appellants' brother did not state in 1922 that he was born in "Gow Gong village, Sun Fook Ley subdivision, Nam Hoy Dist." Undoubtedly what he said in 1922 was what he now says, to wit, that he was born in Sun Fook Ley (also sometimes known as Sar Juey Lay—*the word Ley, Lay, or Lee being the Chinese equivalent of the English word village*), Gow Gong subdivision, Nam Hoy District; for although he is recorded [p. 4] as stating in the present hearing that he was born "Sar Juey village, Gow Gong Nam Hop Dist.," his answer should have been recorded as "in the Sar Juey village, Gow Gong subdivision, Nam Hoy District." Probably this rather ignorant Chinese should not be credited with any expert knowledge of geography, but he should at least be given credit for knowing the geography of his own particular section of China; and, taking his testimony as a whole, and correcting the obvious misinterpretations or erroneous transcriptions appearing therein, it is clear that he now knows, and knew in 1922, the actual facts of this matter.

If mistakes of this kind are so easy to discover in the 1919 and 1922 records, simply by an analysis of the testimony given in the present proceeding, it is certainly reasonable to suppose that other errors may have existed in the 1919 and 1922 records; and no opportunity was afforded in the present hearing for any correction or explanation of those errors, but the testimony of the father and brother with regard to the village, as such testimony was then recorded, was taken as necessarily being correct, as necessarily representing the village as it now exists over eight years later, and consequently it was concluded

on the basis of the testimony of appellants that they did not hail from the same village as their two witnesses and could not therefore be the sons and brothers, respectively, of those witnesses.

It is apparent that both appellants know the village by the name *Sun Fook,* by which it has been called recently (and which is also the name of the boat landing in the immediate vicinity of such village), and are not so familiar with the old name of the place, *Sar Juey,* which is the name with which the father and brother were most familiar undoubtedly because when they were there the village was most commonly called by that name [Tr. Dept. R. pp. 6, 8, 12, 13-14, 18-19]. But there is nothing strange about this; Chinese village names frequently change, and it is easily seen from the testimony that all of the parties know that the place has the two names, and that they are all talking about the same place.

But, it is said, they cannot be talking about the same place because appellants' testimony shows that the so-called "village" contains only three houses and that they do not recollect that it ever contained more than four, whereas it was testified in 1922 that there were six buildings therein; that they cannot be referring to the same place because it was indicated in 1922 that there was an ancestral hall in the "village," and it is now said by appellants that there is none; that they cannot be referring to the same place because appellants claim the village "faces" east, whereas it was stated in 1922 that it "faced" west; and because appellants gave certain names for inhabitants of the "village" that were not given in 1922 and do not

recognize certain names that were given in 1922 as the names of neighbors.

The answers to these things are simply that changes may have taken place during the more than eight years intervening; that the "village," so called, is merly a small group of houses located near a market-town, described by inaccurate interpretation in the present record as consisting of three houses, "all in one row, two in front and one in back"—an obvious impossibility—[Tr. Dept. R. pp. 10, 16]; that it is obvious from the present record that appellants are not at all familiar with the points of the compass —in which they do not differ from Chinese quite generally; that in talking about such a group of houses, rurally located, it would be easy for one or two persons to include in the group isolated buildings nearby, and for one or two others not to regard those buildings as within the group; that this "village," which, unlike Chinese villages generally, has no "head" or "tail" [Tr. Dept. R. pp. 10,16], and which obviously is irregularly arranged, that is, not in a straight row, might easily be regarded by one or two persons as facing one way; and by one or two others as facing in the opposite direction; and that the mentioning, when discussing neighbors, of names not mentioned in 1922, and the failure to recall as neighbors persons so named in 1922, may be due either to changes in inhabitants, or to a changing (according to Chinese customs) in the names of inhabitants, or to births, deaths, etc.; and that, above everything else, careful questioning of the father and brother on the basis of the testimony given by appellants, and the affording of even a slight opportunity to make explanations, might have cleared away every element the least substantial of this matter.

These administrative proceedings with respect to aliens applying for admission to the United States are conducted in an absolutely *ex parte* manner. The evidence is elicited from the principals and their witnesses by the propounding of such questions, put in such form, as the immigration officials choose to ask and formulate. There is no opportunity for cross-examination or for interested parties in that way or otherwise, by themselves or with the assistance of those qualified to assist, to bring out the evidence completely and lucidly. But these very circumstances render it all the more incumbent upon the officials to carry their interrogation and investigation far enough to develop the material facts and to make certain that those testifying are given full opportunity to tell all they know.

> "When Congress vested in these administrative tribunals the power of determining family relationship * * *, it freed them from the technical methods of proof that courts have, but not from the obligation of seeking the truth with open and reasoning minds." *Mason ex rel. Lee Wing You v. Tillinghast,* 27 Fed. (2d) 580, 581, C. C. A., 1st. Cir.

A case very much like the one at bar, in the circumstance that the administrative officials had given significance to discrepancies in the descriptions of a Chinese village made at widely separated periods, is *United States ex rel. Noon v. Day*, 44 Fed. (2d) 239-240, District Court, S. D. of New York. In that case the writ was sustained.

Reasonable opportunity should always be allowed in these cases for witnesses to explain apparently disagreeing testimony. *Hom Chung v. Nagle*, 41 Fed. (2d) 126, 128, 129; *Wong Bing Pon v. Carr*, 41 Fed. (2d) 604, 605, both decided by this Honorable Court.

II.

The Decision of the Immigration Authorities Was Not Supported by Substantial Evidence.

It has been held repeatedly that decisions in these administrative proceedings, in order to be valid, must be supported by some substantial evidence. In the case of *Nagle v. Wong Ngook Hong et al.* (decided January 26, 1928), the District Court for the Northern District of California ruled that "There is no material evidence in either case upon which the immigration authorities could rely to show that the claimed relationship was not established." That decision was affirmed by this Honorable Court. *Nagle v. Wong Ngook Hong et al.*, 27 Fed. (2d) 650.

In *Johnson v. Damon ex rel. Leung Fook Yung,* 16 Fed. (2d) 65-66, the ruling of the Circuit Court of Appeals, First Circuit, was that it is the province of the courts "to determine whether there was any substantial evidence" in support of the administrative decision. The same court held similarly in *Johnson v. Ng Ling Fong,* 17 Fed. (2d) 11, 12. And the Circuit Court of Appeals, Second Circuit, held in *United States ex rel. Leong Ding v. Brough*, 22 Fed. (2d) 926, 928, as follows:

> "But here the evidence does not warrant a reasonable mind holding that the appellant was other than he represented. The result below does not satisfy the requirement of a fair hearing. There is no substantial evidence to support the conclusion below. * * * There was no substantial evidence of contradiction on any material point, which would justify rejecting the testimony which amply supports the claim of the appellant * * *."

See also:

Fong Tan Jew v. Tillinghast, 24 Fed. (2d) 632, 636, C. C. A., 1st Cir.;

Tillinghast v. Wong Wing, 33 Fed. (2d) 290, C. C. A., 1st Cir.;

Chung Pig Tin v. Nagle, 45 Fed. (2d) 484, 485, C. C. A.. 9th Cir.

In the interest of brevity and lucidity a full discussion has been given under the preceding division of this brief of the discrepancies relied upon in the final administrative decision of this case, which arose with regard to the village from which appellants come and the inhabitants of that village, respectively. Considered in the light of all the agreeing testimony upon material points, those discrepancies could scarcely be regarded as substantial evidence against the claim of appellants, anyway; but when they are considered from the point of view of how easily they might have been cleared up or explained, had the hearing been conducted in that fair manner necessary to give full opportunity for the development of the evidence, they become utterly unsubstantial.

Aside from the supposed difference in the description of the village, and supposed failure of appellants to know the names of the neighbors in that village, the single point regarded as of any importance was the variation in the dates of birth of Foo Fu's children and in the order of age in which such children have been placed by Foo Fu. Here again, there enters in the "highly probable" occurrence that errors of interpretation or transcription were made in the old records. Moreover, it is clear from the present record [Tr. Dept. R. pp. 1, 2] that Foo Fu is one

of those frequently encountered fathers who cannot depend upon his own memory for the dates of the birth of his children.

There seems to be not the least doubt, on the evidence as a whole, that these two appellants are two of the children whom Foo Fu has always claimed to have whenever he had an opportunity of making such a claim. Surely the fact that this man, admittedly of poor memory, at one time may have become somewhat confused with regard to the exact order in age of his children, and has at no time been absolutely certain with regard to the exact dates of their birth, cannot be regarded as a substantial piece of evidence justifying the exclusion from the United States of two Chinese minors who claim to be entitled to enter as members of the mercantile class and whose father claims the right, under the decisions of the Supreme Court, to have them with him here.

III.

The Decision of the Immigration Authorities Was Arbitrary and an Abuse of Discretion.

This proposition follows inevitably from the discussion of the case under the preceding two divisions of this brief. It has repeatedly been held that a decision not supported by any substantial evidence is arbitrary and is beyond the powers conferred by law upon immigration officials. In *Fong Tan Jew v. Tillinghast, supra,* it was stated that an administrative finding, not "grounded on substantial evidence, or upon material discrepancies," amounted to a mere

"fiat"; and in addition to the cases cited under the preceding heading, attention should be directed to the following, all decided by this Honorable Court:

Go Lun v. Nagle, 22 Fed. (2d) 246, 248;

Wong Tsick Wye et al. v. Nagle, 33 Fed. (2d) 226, 228;

Gung You v. Nagle, 34 Fed. (2d) 848, 853;

Louie Poy Hok v. Nagle, No. 6349, penultimate paragraph, decided April 6, 1931.

CONCLUSION.

It is respectfully submitted (1) that the hearing conducted by the Immigration Officials was unfair because it did not afford appellants and their interested relatives (father and brother) a full and complete opportunity to testify on material matters; (2) that the decision of the Immigration Authorities was not supported by substantial evidence; and, (3) that the decision of the Immigration Authorities was arbitrary and an abuse of discretion. The order of the District Court therefore should be reversed with directions to issue the writ of *habeas corpus* and discharge appellants.

Dated this 10th day of September, 1931, at Los Angeles, California.

Respectfully submitted,

Y. C. Hong,

Attorney for Appellant.

No. 6445.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Application of
FOO GUEY and FOO WUNG,
On Habeas Corpus.

Foo Guey and Foo Wung,
Appellants,

vs.

Walter E. Carr, District Director, United States Immigration Service at Los Angeles, California,
Appellee.

APPELLEE'S BRIEF.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

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Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the Southern District of California, Central Division, discharging the petition for a writ of habeas corpus [Tr. of Rec., p. 14] and remanding appellants, Foo Guey and Foo Wung to the custody of the United States Immigration Service for deportation. Certain Immigration Service records have been filed with

the clerk of this court pursuant to an order of the District Court [Tr. of Rec., p. 25]. These records will be designated in the following manner when it is necessary to refer to them in this brief: Bureau of Immigration File 55704/782; San Francisco file 18703/1-25; San Francisco file 21068/3-3; San Pedro file 30160/50 and San Pedro file 30160/51. The printed transcript of the proceeding in the District Court will be referred to as "Transcript of Record".

STATEMENT OF FACTS.

Foo Guey and Foo Wung, appellants herein, were both born in China and are of the Chinese race. They arrived at San Pedro, California, about February 23, 1930, on the steamship "President McKinley" and applied for admission at that port as the minor sons of Foo Fu, the latter being a Chinese merchant, lawfully domiciled within the United States. After due hearing by the Board of Special Inquiry, at San Pedro, California, the appellants were excluded from admission to the United States as

> "alien immigrants of a race ineligible to citizenship and not exempted by any of the provisions of Section 13 (c) of the Act of May 26, 1924; as persons not in possession of unexpired immigration vises; and as persons of the Chinese race not in possession of duly viseed Section Six Certificates. In addition to the above grounds, both applicants were debarred as persons likely to become public charges and Foo Wung was denied admission on the additional ground that he was a person under sixteen years of age not accompanied by or coming to join one or both parents."

Thereafter an appeal was filed in accordance with law and a complete record of the proceeding was transmitted to the Secretary of Labor at Washington who on May 9, 1930, caused an order to be issued affirming the excluding decision of the Board at San Pedro. Appellee was prepared to return appellants to China in accordance with law when habeas corpus proceedings were instituted After due hearing, the District Court discharged the petition and remanded appellants to the custody of appellee [Tr. of Rec., p. 14]. From this judgment and order, this appeal has been taken.

QUESTIONS AT ISSUE.

There are only two questions at issue before this Honorable Court.

1. Has the relationship between appellants and Foo Fu been satisfactorily established?
2. Was the hearing that resulted in the order of exclusion a fair hearing?

ARGUMENT.

It is the contention of appellee that the facts in law justified the excluding decision. In reaching this conclusion, the two questions referred to under the heading "Questions at Issue" will be discussed.

As to the First Question.

Has the relationship between appellants and Foo Fu been satisfactorily established?

Section 23 of the Immigration Act of 1924 (Section 221, Tit. 8, U. S. C.) provides in part as follows:

> "Whenever any alien attempts to enter the United States, the burden of proof shall be on such alien to establish that he is not subject to exclusion under any provisions of the immigration laws. . . ."

The appellants are both aliens and the burden is placed upon them by law to show that they are entitled to admission. The only way that the immigration officers could determine the truth of the relationship claims advanced was to question the appellants, their alleged father, and the prior landed brother, regarding matters that should be common knowledge among members of the family. If such testimony had been in substantial agreement, the Board of Special Inquiry might well have decided that the relationship claim had been sufficiently established to justify admission of appellants to the United States. If, on the other hand, such testimony was in disagreement on material matters, the Board may properly have concluded that the relationship does not exist. It will be seen that the Board of Special Inquiry was in the sense handicapped in taking up an inquiry of this character. It is seldom that immigration officers are in position to offer evidence to controvert the claims made by applicants in cases of this character. It becomes necessary, therefore, in such cases for the officers to ask many detailed questions during the course of the examination in an effort to determine whether the case is *bona fide* or is a fraudulent one, where the witnesses have been carefully coached as to the testimony they are to give. Such procedure is recognized by this Honorable Court in cases of this character as indicated by its decision in *Wong Foo Gwong v. Carr,* 50 Fed. (2d) 362, wherein the court held in part

> "the Immigration officials must necessarily base their decisions upon conflicts or agreements that arise in the testimony of applicants for admission and that of their witnesses."

In according hearing to these appellants, the immigration officers had no desire to entrap the witnesses or to develop discrepancies in testimony. Their sole object was to determine the truth.

On pages 20 and 21 of the Board hearing accorded appellants as it appears in Bureau of Immigration File 55704/782, will be found twenty-two discrepancies in testimony involving the appellant Foo Guey. On pages 21 and 22 will be found eighteen discrepancies in testimony involving the appellant Foo Wung. While some of these discrepancies may not be considered as material yet the Board of Review considered some of them of such materiality that it sustained the excluding decision of the Board of Special Inquiry. In the Bureau of Immigration File 55704/782 will be found an original memorandum prepared by the Board of Review dated May 9, 1930, and in that memorandum certain discrepancies are pointed out which challenged the relationship claim advanced.

The first of these discrepancies involves the age of the appellants. Reference to the testimony of Foo Fu as it appears in his sworn statement of November 30, 1919, incorporated in San Francisco File 18703/1-25, indicates that in San Francisco on the date in question, he claimed Foo Wing (Wung), one of the appellants herein, was eight years of age, and that he had been born C. R. 1-3-23 (May 9, 1912). In the same statement he claimed that Foo Guey, the other appellant herein, was then five years

of age and that he had been born C. R. 3-8-15 (October 4, 1914). That statement is in conflict with the testimony of Foo Fu before the Board at San Pedro, is in conflict with the testimony of Foo Wai, the identifying witness, and is in conflict with the testimony of appellants themselves.

The second discrepancy of note is that with reference to the home village of the appellants in China. They testified before the Board that their home village consisted of three houses. Never within their memory apparently, had their been more than four houses in the village. One of these houses burned several years ago. According to the descriptions and diagrams furnished by the appellants there has never been an ancestral hall in the village as far as they can remember and they have always lived in the first house in the front of the village. According to the diagram submitted by the alleged father in 1922, there were six dwelling houses in the village and an ancestral hall as well. Furthermore, the alleged father in 1922 indicated in a diagram that the house where his family lived, which is the house that the present appellants claim is their home, is the second house in its row. The existence of the ancestral hall was testified to by the alleged father and by the alleged brother in 1922. That was only eight years ago and appellee believes that both of these appellants, who are aged 18 and 15 respectfully, should know of the existence of this ancestral hall, if they were in fact natives of the village in discussion.

There is also some difference of testimony as to which way the village faces. In 1922 the alleged father and

the prior landed alleged brother, Foo Wai, testified that the village faced the west. In their examination at San Pedro, the appellants testified that the village faces east [pages 10 and 16, hearing of March 18, 1930, appearing in Bureau of Immigration File 55704/782], and seemed definitely to have fixed the direction the village faces when they testified that the sun rises in front of the village and sets behind it.

In 1922, when Foo Wai, the identifying witness, was an applicant for admission, as indicated by San Francisco File 21068/3-3, detailed testimony was given regarding Chinese residents of the village. The appellants herein know practically nothing concerning those neighbors. While during the eight years intervening there may have been some changes in the residents of the neighborhood, it is not reasonable to believe that there would be so complete a change in the population that the appellants would have no knowledge of the former residents.

There is also a discrepancy between the testimony of the alleged father and of the appellant Foo Guey. The father testifies [page 3, hearing of March 18, 1930, appearing in Bureau of Immigration File 55704/782] that Foo Guey started to school two years before he, the alleged father, left China in 1919. The appellant testifies [page 7 of the same record] that he did not start to school until he was eleven years, which was after his father left home.

In order for the Board of Special Inquiry to have found that Foo Fu is the father of the appellants, it would have been compelled to rely upon a record fraught with discrepancies and contradictions. The Board be-

lieved that the appellants had not sustained the burden of proof placed upon them by law and excluded them. It is well decided that the courts will not interfere with the findings of administrative officials upon issues of fact involved unless it can be shown that those findings could not reasonably have been reached by a fair minded man and hence are arbitrary.

Chin Share Nging v. Nagle (C. C. A. 9th), 27 Fed. (2d) 848.

See also:

Ng Fung Ho v. White, 259 U. S. 276;
Wong Nung v. Carr, 30 Fed. (2d) 766.

For the above reason, appellee contends that the first question "Has the relationship between appellants and Foo Fu ben satisfactorily established?", must be answered in the negative.

As to the Second Question.

The second question relates to the fairness of the hearing which resulted in the order of exclusion. Later in this brief we will discuss the various grounds upon which counsel bases his claim to unfairness. For the present, appellee believes it is sufficient to point out that the hearing in the case at bar was conducted by members duly authorized to conduct such hearings and that the hearing throughout proceeded in accordance with rules prescribed by the Department of Labor. The appellants were examined, their witnesses were examined, and they were allowed to produce evidence and testimony to substantiate their claims. After the excluding decision had been en-

tered, counsel filed a brief in behalf of appellants. It cannot be said, therefore, that as far as the method of procedure followed is concerned, there was any unfairness. We do not believe that the allegations of unfairness is supported by the record and feel that a perusal of the record heretofore filed will support appellee's contention on this point.

Therefore, appellee respectfully contends that the second question "Was the hearing that resulted in the order of exclusion a fair hearing?", must be answered in the affirmative.

REPLY TO APPELLANTS' BRIEF.

Counsel for appellants advances three grounds to support his contention that the appeal herein should be sustained. We will discuss these points in the order in which they appear.

First Ground.

On page 8 of his brief, counsel contends that

> "The hearing conducted by the Immigration officers was unfair because it did not afford appellants and their interested relatives (father and brother) a full and complete opportunity to testify on material matters."

On page 8 of his brief counsel cites numerous cases which hold in effect that the authority of immigration officers must be fairly exercised and must be consistent with the fundamental principles of justice embraced within the conception of due process of law. Without detailed reference to these cited cases, appellee concedes that the holdings are correct and contends that the hearing in the case

at bar was held in accordance with the principles laid down in those decisions.

On page 9 of his brief counsel points out that during the hearing at San Pedro, neither the alleged father of the appellants nor the prior landed alleged brother of the appellants were asked any questions regarding the home village of the appellants in China, the testimony of the alleged father and of the prior landed alleged brother as given by them at the time the latter was an applicant for admission at San Francisco in 1922 being the only basis by which the truth of present testimony may be judged. Appellee believes that procedure was the only procedure the Board consistently could have followed. The alleged father has not been in China since 1919. The prior landed alleged brother has not been in China since 1922. Manifestly, therefore, the alleged father and the alleged brother were not in position to give testimony regarding changes in the home village since they were there last, and it would have been futile for the Board to have questioned Foo Fu and Foo Wai concerning the home village since they were there last. But in the testimony given by the alleged father and the alleged brother in 1922 regarding the identity of the people in the neighborhood of the home village in China at that time, a number of persons were specifically named. The appellants knew practically none of those people. They should have known some of them at least had they resided in the home village in 1922 and thereafter as claimed by them. It does not seem reasonable to suppose that appellant Foo Guey, who in 1922 was ten years of age, or that Foo Wung, who in 1922 was seven years of age,

would have no knowledge of the identity of the people living in their own neighborhood. Furthermore, these people unquestionably lived in that neighborhood later than the year 1922. Normal boys of those ages know everybody in their own immediate neighborhood. Counsel has ingeniously pointed out that changes frequently occur in the names of Chinese people. It hardly seems possible that all of the people in the vicinity of the appellants home in China would have found it necessary to change their names. If those changes occurred, they must have occurred since 1922, and if the appellants knew them under their old names the presumption is that they would know them under their new names. We do not believe that counsel's explanation on this point is tenable. Nor did the Board of Review in Washington overlook the changes that the passage of time might bring, for in its memorandum of May 9, 1930, appearing in the Bureau of Immigration File 55704/782, the Board of Review stated:

> "Some allowance must therefore be made in comparison of the testimony of these Applicants with that of their witnesses for expectable lapses of memory, but the outstanding disagreements which this testimony shows are between that given by these applicants now and that which was given by their alleged father and prior landed alleged brother when the latter was applying for admission in 1922."

For the reasons above stated, appellee believes that failure of the Board at San Pedro to question the alleged father and the alleged brother of appellants concerning present conditions of the home village in China, cannot be construed as not affording the alleged father and alleged brother complete opportunity to be heard.

On page 9 of his brief counsel points out that there is a substantial agreement between all parties with regard to the main items of information concerning the appellants' family history. He cites *Gung You v. Nagle*, 34 Fed. (2d) 848 and *Hom Chung v. Nagle*, 41 Fed. (2d) 126. We do not believe the cited cases can offer a standard by which the case of these appellants may be judged. Those cases were decided upon their own merits. This case must be decided in the same manner and we feel that an examination of the record will substantiate the findings of the Board of Special Inquiry at San Pedro and the findings of the Board of Review in Washington that there was not a substantial agreement in testimony sufficient to warrant admission of these appellants.

Pages 10 to 16 of counsel's brief points out that errors in translation and transcription sometimes appear in immigration records and urges that fact as a further reason why the alleged father and alleged brother of appellants should have been questioned by the Board at San Pedro relative to present conditions in the home village in China. As an example of possible misunderstanding that may arise during these examinations, on pages 11 and 12 of his brief counsel cites *verbatim*, testimony concerning the correct name of a certain village in China and apparently considers this variation in the name of the village an example of how such unexplained testimony may militate against the appellants. While the Board at San Pedro referred to the discrepancies regarding the proper name of this village [see discrepancy No. 13, page 22 of the hearing, appearing in the Bureau of Immigration File 55704/782], yet it will be noted from the memo-

randum of the Board of Review in Washington under date of May 9, 1930, appearing in the same file, that no reference is made to this discrepancy in names nor is there any indication that the Board even considered that discrepancy in reaching its conclusion. It is doubtless true, as pointed out in *Ex parte Cheung Tung,* 292 Fed. 997, which case is referred to by counsel on page 11 of his brief, that sometimes mistakes do creep into these immigration records but it cannot be believed that all of the immigration records are always incorrect. Counsel even goes so far as to set forth on page 10 of his brief "there is no absolute certainty that the 1919 and the 1922 records are correct in what they purport to show with regard to the statements then made by these witnesses concerning the village." Foo Fu and his alleged son, Foo Wai, were admitted at San Francisco upon the strength of those records and it must be conceded that those records were sufficiently correct to justify those admissions. We feel that it ill behooves counsel to attack the correctness of those records now. That it is proper for the Immigration Service to rely upon its own official records may not be disputed. In *Wong Foo Gwong v. Carr, supra,* this Honorable Court held in part:

> "It is a well established rule in cases of this kind that it was not improper for the Immigration officials to refer to their past records in order to determine the weight to be given to the testimony of the alleged father Wong Sheh Woo. Tang Tun v. Edsell, 223 U. S. 673."

In *Ex parte Keizo v. Kamiyama,* 44 Fed. (2d) 503, this Honorable Court held "the Immigration authorities are entitled to take notice of all our records."

On page 16 of his brief, counsel contends that reasonable opportunity should have been allowed the witnesses to explain appellants' disagreements in their testimony. On page 2 of Foo Fu's testimony of March 18, 1930, as it appears in the Bureau of Immigration File 55704/782, the court will note that Foo Fu was given opportunity to explain the discrepancies as to the birth dates of these appellants. On page 3 of the same record Foo Fu was given an opportunity to explain the difference in the names applicable to the home village. On page 4 of the same record Foo Wai was given the same opportunity, and throughout the record witnesses were given a chance to explain certain disagreements in testimony. No opportunity was given Foo Fu or Foo Wai to explain the discrepancies regarding the existence of the ancestral hall in the home village. The testimony of both of these witnesses in 1922 was positive as to the existence of the ancestral hall. The testimony of the appellants before the Board at San Pedro was equally positive as to the nonexistence of the ancestral hall. Appellee contends that as to this feature there was nothing to explain. As heretofore pointed out, the Board of Review apparently disregarded the discrepancy as to the names of the village in China and the Board of Review memorandum of May 9, 1930, indicates (paragraph 3) that allowance must be made for "lapses of memory," and, in paragraph 5 of the same memorandum points out that some changes must have taken place in the home village during the previous eight years. With these facts taken into consideration, however, the Board could not overlook the glaring discrepancies which apparently were unexplainable and felt that it could not concede that the appellants herein had established the relationship claims sufficiently to entitle them to admission.

Second Ground.

On page 17 of counsel's brief, appears this heading:

> "The decision of the Immigration authorities was not supported by substantial evidence."

While the Circuit Court of Appeals for the First Circuit apparently has held in the cases cited on pages 17 and 18 of counsel's brief, that there must be some substantial evidence to support the excluding decision of the Immigration authorities, we find no cases decided by this Honorable Court wherein the same doctrine has been adopted. Nor do we believe that *U. S. ex rel. Leong Ding v. Brough,* decided by the Circuit Court of Appeals for the 2nd Circuit, 22 Fed. (2d) 926, indicates that that court has unqualifiedly adopted the line of reasoning followed by the Circuit Court of Appeals for the 1st Circuit. The decision in the Leong Ding case seems to have turned on the question as to whether the slight contradictions in the record justified rejecting the testimony which otherwise supported the appellant's claim.

In further support of his theory, counsel cites the case of *Nagle v. Wong Ngook Hong et al.,* decided by the District Court in the Northern District of California in January, 1928. Appellee has made a vain but diligent search for the District Court report in this case but has been unable to locate it and believes that the District Court decision is unrecorded. A careful reading of the case as decided by this Honorable Court on appeal, however, as reported in 27 Fed. (2d) 650, seems to indicate that the decision was affirmed on the theory that the discrepancies in testimony of applicants and their wit-

nesses were insufficient to justify the excluding decisions of the Immigration authorities. At any rate, we find nothing in the Circuit Court of Appeals' decision to support the theory contended for by counsel.

Appellee believes that substantial evidence to support the excluding decision was not required in the case at bar nor in the Circuit Court of Appeals cases cited by counsel and feels that in reaching its conclusions, the Circuit Court of Appeals for the 1st Circuit failed to take into consideration Section 23 of the Immigration Act of 1924 (Tit. 8 U. S. C., Section 221), reading in part as follows:

> "Whenever any alien attempts to enter the United States, the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provisions of the Immigration laws. . . ."

Appellants herein are both aliens. They are attempting to enter the United States. The burden of proof is placed squarely upon them by law to establish that they are not subject to exclusion. This burden of proof remains with the appellants throughout the case and failure to meet that burden must result in exclusion. The law does not place upon the Government the burden of producing evidence to support an excluding order. This theory was recognized by the United States District Court, Northern District of California, on November 24, 1926, in *Ex parte Jew You On*, 16 Fed. (2d) 153, where the court held in a case of a Chinese applicant seeking admission to the United States as the son of a citizen of this country:

> "The question is not, Is there substantial evidence to support the judgment of exclusion? but is only, Is the said judgment supported by law, in view of the facts as the Immigration officers find them?"

The correctness of this theory has been recognized by this Honorable Court in *Jew Theu v. Nagle,* 35 Fed. (2d) 858, 859. In that case the applicant sought admission as the son of an American born Chinese father and was excluded. In deciding the case, this Honorable Court held in part:

> "The single question is whether the evidence submitted on the application for admission so conclusively established the alleged relationship that the order of exclusion should be held arbitrary or capricious."

This same theory was followed in *Jue Yim Ton v. Nagle,* decided by this Honorable Court and reported in 48 Fed. (2d) 752.

Under the Jew Theu and Jue Yim Ton cases, *supra,* the correct test seems to be, not whether the Immigration authorities had substantial evidence to support the excluding decision, but whether the applicants have so conclusively established the relationship claim that an excluding decision is arbitrary or capricious or unfair.

From the above it will appear, therefore, that counsel's second ground is untenable.

Third Ground.

On page 19 of his brief, counsel contends:

> "The decision of the Immigration authorities was arbitrary and an abuse of discretion."

Counsel cites certain cases on page 20 of his brief in support of his theory that the courts will not permit exclusion of applicants where the board has acted arbitrarily and abused its discretion in arriving at its excluding decision. Appellee does not question this theory. Each case must be decided upon its own particular facts. Appellee believes that the record in this case will convince

this Honorable Court that no opportunity was denied the appellants to establish their claim, or that in reaching its decision, the Board abused its discretion or took arbitrary action in arriving at its decision. From the discrepancies developed in testimony, the Board simply did not believe that the appellants are the sons of Foo Fu and excluded them. As pointed out in *Jue Yim Ton v. Nagle, supra,*

> "The question is not whether this court, acting on the evidence submitted, might have found differently from the executive branch of the Service; the question is whether or not the latter granted a fair hearing and abused their discretion. Tang Tun v. Edsell, 223 U. S. 673; United States v. Ju Toy, 198 U. S. 253; Low Wah Suey v. Backus, 225 U. S. 468."

For the above reasons, appellee respectfully contends that counsel's third ground is untenable.

CONCLUSION.

Appellee respectfully contends:

1. That the relationship between appellants and their alleged father has not been satisfactorily established.

2. That the hearing which resulted in the order of exclusion was a fair hearing.

3. That the appeal herein should be dismissed and appellants should be remanded to appellee for return to China in accordance with law.

Respectfully submitted,

SAMUEL W. MCNABB,
United States Attorney,
By MILO E. ROWELL,
Assistant United States Attorney,
Attorneys for Appellee.

HARRY B. BLEE,
U. S. Immigration Service on the Brief.

No. 6447

United States
Circuit Court of Appeals
For the Ninth Circuit.

GWYNETH HELBUSH,

Appellant,

vs.

HERMAN H. HELBUSH,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GWYNETH HELBUSH,

Appellant,

vs.

HERMAN H. HELBUSH,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

GEO. CLARK, Esq.,
Pacific Mutual Building, Los Angeles, California.

HARRY I. STAFFORD, Esq.,
Flood Building, San Francisco, California.

For Appellee:

SULLIVAN, ROCHE, JOHNSON & BARRY, Esqs.,

Humboldt Bank Building, San Francisco, California.

UNITED STATES OF AMERICA SS:

To HERMAN H. HELBUSH, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of April, A. D. 1931, pursuant to an order allowing appeal filed on March 24, 1931 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause in equity entitled GWYNETH HELBUSH, Plaintiff, vs. HERMAN H. HELBUSH, Defendant, No. S-40-C, Central Division, wherein GWYNETH HELBUSH is the Appellant, and you are the Appellee, to show cause, if any there be, why the order and judgment in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave United States District Judge for the Southern District of California, this 1st day of April, A. D. 1931, and of the Independence of the United States, the one hundred and fifty-fifth.

Geo. Cosgrave

U. S. District Judge for the Southern District of California.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit Gwyneth Helbush, Plaintiff and Appellant, vs. Herman H. Helbush, Defendant and Appellee. Citation Receipt of a copy of the within citation together with copies of petition for appeal, assignment of errors, order allowing appeal, bond on appeal, and praecipe for transcript of record is hereby admitted this 3rd day of April, 1931. Sullivan, Roche, Johnson & Barry Attys for Appellee, H. H. Helbush Filed Apr 8—1931 R. S. Zimmerman, Clerk

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GWYNETH HELBUSH,
Plaintiff,
vs.
HERMAN H. HELBUSH,
Defendant.

In Equity
No. S-40-C

BILL OF COMPLAINT IN EQUITY TO SET ASIDE VOID JUDGMENT AND FOR INJUNCTION.

TO THE HONORABLE, THE JUDGES OF THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

In the above entitled cause the plaintiff, GWYNETH HELBUSH, a citizen of the United States and a resident of the City and County of San Francisco in the Northern District of California, brings this, her bill of complaint in equity against the defendant, HERMAN HELBUSH, also a citizen of the United States and a resident and inhabitant of the City of Los Angeles, County of Los Angeles, in the Central Division of the Southern District of California, and complaining of the said defendant, alleges:

I

1. That the ground upon which the jurisdiction of said court depends herein, is that specified in subdivision a of section 24 of the Judicial Code, to-wit: a civil suit in equity

where the matter in controversy exceeds, exclusive of interest and costs, the value of Three thousand Dollars ($3,000.00) and arises under the Constitution of the United States.

2. That for the matters herein complained of the plaintiff has no adequate remedy at law.

II

1. That heretofore, to-wit: on the 9th day of March, 1923, the plaintiff and defendant intermarried in the said City of Los Angeles, State of California, and ever since have been, and now are, husband and wife, unless the final decree of divorce hereinafter alleged is valid and not void. That for the reasons specially averred herein, the said decree is void for want of jurisdiction in the court which rendered and entered it. That on the 14th day of January, 1924, the said defendant wilfully deserted the plaintiff by voluntary separation from her with the intent then and there to desert her. That there is community property real and personal of said parties, in the possession and control of the defendant, situated in said Central Division of the Southern District of California, a more particular description of which property the plaintiff is unable to give without an accounting and discovery of the same herein. That said community property is of a value exceeding Five hundred thousand Dollars ($500,000.00). That the defendant conceals said property from plaintiff and claims the same adversely to her as being his own separate property and asserts that he is the owner thereof in fee simple absolute. The said claim of the defendant is without right and constitutes a cloud on plaintiff's interest therein as community property. That plain-

tiff's said interest in said property is of a value exceeding Two hundred and fifty thousand Dollars ($250,000.00).

2. That the matter in controversy herein exceeds, exclusive of interest and costs, the value of Three thousand Dollars ($3,000.00) and arises under the Constitution of the United States, to-wit: Section one of the Fourteenth Amendment of said Constitution, in respect of the requirement therein for due process of law.

3. That in an action then pending in the Superior Court of the State of California, in and for the City and County of San Francisco, wherein the said GWYNETH HELBUSH was plaintiff and the said HERMAN HELBUSH was defendant, the said Superior Court by its interlocutory decree made and entered in said action on the 27th day of June, 1924, ordered, adjudged and decreed under the provisions of section one hundred and thirty-one of the Civil Code of the State of California, that said plaintiff is entitled to a divorce from said defendant on the ground of his extreme cruelty by him theretofore inflicted upon her. That thereafter, and in the month of August, 1924, plaintiff condoned said offense of extreme cruelty in said interlocutory decree specified, by returning to live with said defendant as his said wife and by resuming matrimonial cohabitation and matrimonial relations with him. That said cohabitation thereupon continued until the 3rd day of January, 1929, when defendant again wilfully deserted plaintiff by his voluntary separation from her with the intent then and there to desert her, and they ever since have been, and now are living separate and apart from each other, but without the consent and against the will of plaintiff.

4. That on the 10th day of April, 1929, the said defendant obtained ex parte and without the knowledge or consent of plaintiff and without notice to her and without affording her an opportunity to be heard against it, a final decree of divorce in said action from said Superior Court. That said ex parte decree of divorce was made by said Superior Court on the 10th day of April, 1929, and entered therein the next day. That in making and entering the said decree of divorce the said Superior Court did so solely on the basis of said interlocutory decree it had previously granted the plaintiff and not upon any pleading by defendant and only on his ex parte motion, without any notice to plaintiff and without affording her a hearing nor an opportunity to be heard. That said Superior Court thereby exceeded its jurisdiction and also acted in excess of its jurisdiction in that said condonation barred said decree of divorce and section one hundred and eleven of the Civil Code of California, because of said condonation, prohibited the said decree of divorce and deprived said Superior Court of jurisdiction to grant the same.

5. That thereafter, to-wit: on the 7th day of May, 1929, the said Superior Court denied the motion of plaintiff to vacate and set aside said decree of divorce for want of jurisdiction to grant said decree, and thereafter, and on the same day, the plaintiff appealed from the said order denying the motion, to the Supreme Court of said State. That on the 15th day of July, 1930, the said Supreme Court determined said appeal by affirming the said order denying said motion and did so on the sole and irrelevant ground that plaintiff did not come into a court of equity with clean hands sufficiently to move the conscience of a chancellor in favor of her said motion to vacate said final

decree of divorce. That thereafter, and on the 11th day of August, 1930, the said Supreme Court denied the petition of plaintiff for a rehearing. That said matters relating to said appeal and its determination by said Supreme Court are alleged herein solely for the purpose of showing the absence of laches in the filing by plaintiff of this bill of complaint.

6. That said condonation by plaintiff of said offense of extreme cruelty specified in said interlocutory decree was not disputed by said defendant on said appeal, nor adjudged invalid or non-existent by said Superior Court nor by said Supreme Court, nor did the latter court determine that said Superior Court had competent jurisdiction to grant or issue said ex parte final decree of divorce despite said condonation, nor that said decree was not in violation of the "due process of law" clause in the Fourteenth Amendment of the Constitution of the United States, but the said Supreme Court affirmed said order of the Superior Court denying plaintiff's motion to vacate said decree upon the sole ground that plaintiff's motive in making said condonation was a "monetary" one, that thereafter she had been guilty of offenses constituting grounds of divorce and that for these reasons she did not come into a court of equity with clean hands and that therefore her said motion to vacate the said ex parte final decree for want of jurisdiction was rightly denied by said Superior Court and should be and was accordingly affirmed by said Supreme Court solely for said reasons. That said reasons for affirming said order are not pertinent or relevant to the said jurisdictional and constitutional objections urged by plaintiff in support of said motion and said appeal.

That each of said jurisdictional and constitutional objections was urged by plaintiff before said Superior Court on said motion to vacate said ex parte final decree and before the said Supreme Court on said appeal, but each of said courts entirely disregarded and evaded and did not decide the same, but in effect held that said objections were precluded as points in the case by the plaintiff not coming into a court of equity with clean hands and for the reasons hereinbefore averred. That at no time was there pleading or proof or trial before said Superior Court concerning or involving any of said reasons, but merely ex parte and hearsay affidavits were presented by defendant and received by said Superior Court against said motion and over the objection and exception of plaintiff on the hearing of said motion to vacate said decree of divorce. That said action of the Superior Court in determining said motion on said affidavits adversely to plaintiff and said decision of the Supreme Court are in violation of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, in depriving plaintiff of a trial according to the course of the common law, upon issues presented by pleadings and upon evidence by witnesses subject to examination and cross-examination.

7. That the said Superior Court in denying plaintiff's said motion to vacate said ex parte decree of divorce and the said Supreme Court in affirming the order denying the motion, held that Section 132 of the Civil Code of California sustained said ex parte decree. That said Section 132 as thus construed by said State courts is in violation of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States in depriving plaintiff of her said marital status and of her

said interest in the community property without giving her the right to a hearing or affording her an opportunity to be heard against said decree, on the ground that said Superior Court had no jurisdiction to grant or render or enter the same in that the offense specified in said interlocutory decree had been condoned by plaintiff subsequentiy to the latter decree and that section one hundred and eleven of the Civil Code of said State of California denied to said Superior Court all authority and power to grant, make or enter said final decree, because of said condonation. That a judgment or decree of a court without jurisdiction to render it is not the due process of law secured to the plaintiff by the Fourteenth Amendment of the Constitution of the United States. That said final decree is also in conflict with said provision of the Constitution by reason of the ex parte nature of said decree and its having been made and entered without giving plaintiff a hearing or an opportunity to be heard in defense of her legal rights.

8. That said ex parte proceedings and the said resulting final decree of divorce were and are without the consent of plaintiff and against her will and operate to prevent and do prevent her from enforcing by process of law her legal rights as the wife of defendant. That said defendant is putting forth said final decree and claiming under the same as being a dissolution of said marriage and as depriving plaintiff of any and all rights in said community property acquired subsequently to said decree, to-wit: property acquired by said parties otherwise than by gift, bequest, devise or descent and not the rents, issues or profits of defendant's nor of plaintiff's separate estate. That the value of plaintiff's interest in said community property so

acquired exceeds the sum of two hundred thousand dollars. That said defendant excludes plaintiff from her said interest in said community property and refuses her an accounting of the same, but is appropriating said interest of plaintiff to his own use and without her consent, and concealing said property from her and does thereby prevent her from obtaining a specific description of the same. That by reason of said concealment, plaintiff is unable to furnish said description at this time. That all said acts of said defendant on the basis of said final decree of divorce are to the irreparable damage and injury of plaintiff. That plaintiff has no adequate remedy at law to set aside and have adjudged void said final decree of divorce as being in violation of her said constitutional right to due process of law, nor to prevent said defendant from asserting any rights against her on the basis of said decree, nor to have adjudged void said section 132 of the Civil Code of said State of California to the extent it is construed by said Supreme Court to sanction and sustain said ex parte decree of divorce, and therefore in violation of the said constitutional right of plaintiff.

II

WHEREFORE, plaintiff prays it be adjudged that the said ex parte final decree of divorce and the said Section 132 of the Civil Code of the State of California, to the extent it sustains the same, are in violation of the "due process of law" clause in the Fourteenth Amendment of the Constitution of the United States and therefore void; that said final decree of divorce be accordingly set aside and annulled and the said defendant perpetually enjoined and restrained by writ of injunction from asserting, claiming and setting up any right or title adverse to plaintiff

under or by virtue of said final decree of divorce and particularly from asserting and claiming that said marital status and marital relations have been dissolved by said decree and from asserting and claiming any right, title or interest in said community property adverse to the said interest of plaintiff therein. That her interest in said community property as the wife of defendant be adjudged and established. That plaintiff be granted such other, further and different relief as may be just and equitable and for costs of suit.

George Clark
Pacific Mutual Building, Los Angeles.
Harry I. Stafford
Solicitors for Plaintiff.
Flood Building, San Francisco.

STATE OF CALIFORNIA)
(SS.
CITY AND COUNTY OF SAN FRANCISCO)

GWYNETH HELBUSH being first duly sworn, deposes and says:

That she is the plaintiff in the above entitled action; that she has read the foregoing Bill of Complaint in Equity and knows the contents thereof; that the same is true of her own knowledge except as to the matters which are therein stated on her information or belief and as to those matters, that she believes it to be true.

Gwyneth Helbush

Subscribed and sworn to before me, this 11th day of September, 1930.

[Seal] Edward P. McAuliffe
Notary Public in and for the City and County
of San Francisco, State of California.

[Endorsed]: S-40-C Original. In the Central Division of the United States District Court, in and for the Southern District of California. Gwyneth Helbush, plaintiff, vs. Herman H. Helbush, defendant. Bill of Complaint in Equity to Set aside void judgment and for Injunction. Filed Sep 25 1930 R. S. Zimmerman, Clerk. By Edmund L. Smith Deputy Clerk George Clark and Harry I Stafford Attorneys for Plaintiff 1101-2-3 Pacific Mutual Bldg. Los Angeles, Calif. Mutual 6327

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

GWYNETH HELBUSH,	:	
	:	
Plaintiff	:	
	:	
- vs. -	:	In Equity
	:	No. S-40-C
HERMAN H. HELBUSH,	:	
	:	
Defendant.	:	
- - - - - - - - - - - - - - - - - - - -	:	

MOTION TO DISMISS

NOW COMES the defendant in the above entitled action, Herman H. Helbush, and files this as his motion to dismiss the above entitled action, and moves the above entitled Court to dismiss the bill of complaint in equity on file in said action upon each and every of the following grounds, to wit:

(1) That said bill of complaint does not state facts sufficient to constitute a valid or any cause of action in equity or otherwise against this defendant.

(2) That said bill of complaint does not state facts sufficient to entitle the plaintiff to any relief as against this defendant.

(3) That the allegations and averments of said bill of complaint raise no Federal question and do not state facts sufficient to confer upon this Court jurisdiction either as to the parties or subject matter of said action.

(4) That it appears upon the face of said bill of complaint that no question arises from the averments thereof under the constitution of the United States, and no constitutional question is involved in the matters and things averred in said complaint.

(5) That it appears upon the face of said complaint that all of the matters and things alleged therein have been fully litigated between the parties to a final determination in the Courts of the State of California which had and has jurisdiction of the parties and of the subject matter of the said bill of complaint.

(6) That it affirmatively appears upon the face of said complaint that the controversy between the parties sought to be set forth therein does not arise under the constitution of the United States, and it likewise affirmatively appears that there has been no violation of Section 1 of the 14th amendment of the constitution of the United States in respect to the provision thereof for due process of law.

WHEREFORE the said defendant prays that said action and said bill of complaint be dismissed, and that he have and recover judgment for the costs incurred herein.

DATED: This 14th day of October, 1930.

Sullivan Roche Johnson & Barry.
ATTORNEYS FOR DEFENDANT.

[Endorsed]: Orig No. S-40-C In the Central Division of the United States District Court in and for the Southern District of California Gwyneth Helbush, Plaintiff, vs. Herman H. Helbush, Defendant. Motion to Dismiss Received copy of Motion to Dismiss this 16th day of October 1930—George Clark Atty for Ptlf Filed Oct 16 1930 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk. Sullivan, Roche, Johnson & Barry, Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

GWYNETH HELBUSH,	)	
Plaintiff,	)	
V.	)	In Equity No S-40-C Decision.
HERMAN H. HELBUSH,	)	
Defendant.	)	

Plaintiff brings this bill in equity, in which she charges that on June 27, 1924, she obtained an interlocutory decree of divorce against defendant, then her husband, in the Superior Court of the State of California, in and for the City and County of San Francisco. That in August, 1924, she condoned the offense of the defendant on which the divorce had been obtained and the parties again began

living together. That this continued until January 3, 1929, when defendant deserted her. That on April 10th, 1929, defendant sought and obtained the entry in the trial court a final decree of divorce without any notice to her of any kind and without her consent. That she moved in the trial court to set aside the final decree on the ground that no notice had been given her of defendant's intention to have the same entered. That the offense of defendant, on which the interlocutory decree was based, had been condoned and the court was without jurisdiction to enter the decree. That the trial court on May 7, 1929, after a hearing, denied her motion and she then prosecuted an appeal to the Supreme Court of California from the ruling of the trial court, and the Supreme Court on July 15, 1930, affirmed the ruling of the trial court. (Helbush vs. Helbush, 290 P. 18.)

She further charges that defendant is possessed of a large amount of property in which she is entitled to a community interest, and asks that this court intervene in her behalf on the ground that through the action thus taken against her she has suffered a deprivation of property rights without due process of law in violation of the right guaranteed her by the fourteenth amendment of the United States Constitution. Diversity of citizenship is not alleged.

Plaintiff prays that the final decree and Section 132 of the Civil Code to the extent it ~~assists~~ sustains the same be adjudged in violation of the due process of law clause of the United States Constitution and the decree be set aside.

Plaintiff files her bill not on the theory that she has not had her day in court but because the Court improperly denied her relief. I am not aware of any precedent for

such a proceeding. A final judgment has been entered in the State Court. There is no exception to the rule, except in a class of cases in which this is not included, that where a court, having jurisdiction of the parties and the subject matter, enters a final judgment, it settles once and for all the questions raised or that might have been raised in the action. A final judgment has been entered in this case in the State Court which it is beyond the power of any other court to disturb.

Without passing upon the question whether the plaintiff having prosecuted her action for relief to a final judgment in the State Court, has not been accorded due process of law, it is plain that this court has no jurisdiction of such an action. If plaintiff was denied the due process of law guaranteed by the United States Constitution by the entry of a final decree of divorce without notice to her under the provisions of Section 124 of the California Civil Code, then, such question having been presented to the California Supreme Court, relief can only be afforded her by the United States Supreme Court. (U. S. Judicial Code 237, Rooker vs. Fidelity Trust Co. 263 U. S. 413.)

The plaintiff's bill must therefore be dismissed without leave to file an amended bill.

It is so ordered.

Geo. Cosgrave
U. S. District Judge

[Endorsed]: No S 40-C In the District Court of the United States for the Southern District of California Gwyneth Helbush Plaintiff vs Herman H. Helbush Defendant Decision Filed Jan 27 1931 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

* * * *

GWYNETH HELBUSH,

Plaintiff,

vs.

HERMAN H. HELBUSH,

Defendant.

In Equity

No. S-40-C.

DECREE DISMISSING BILL.

* * * *

The motion of the defendant, Herman H. Helbush, to dismiss the bill of complaint filed in the above entitled proceeding came on regularly for hearing before the above entitled court, which motion was argued by counsel for the respective parties, and the motion having been submitted to the court for its consideration, and decision, and the court having fully considered the same and having given and made its decision herein granting said motion;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADUDGED AND DECREED that the motion of said defendant to dismiss the bill of complaint herein be, and the same is hereby granted without leave to said plaintiff to amend said bill of complaint.

DONE IN OPEN COURT this 24th day of February, 1931.

Geo. Cosgrave.
United States District Judge.

APPROVED AS TO FORM: as provided in Rule 44.
George Clark
Harry I. Stafford
Attorneys for Plaintiff.

Decree entered and recorded 2/24/31 R. S. Zimmerman Clerk. By Francis E. Cross Deputy Clerk.

[Endorsed]: In Equity S-40-C In the Central Division of the United States District Court in and for the Southern District of California Gwyneth Helbush, Plaintiff vs Herman H. Helbush, Defendant. Decree Dismissing Bill. Filed Feb 24 1931 R. S. Zimmerman, Clerk By Frances E. Cross Deputy Clerk Law Offices Frank P. Doherty Suite 519 Title Insurance Building 433 So. Spring Street Los Angeles, California.

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

GWYNETH HELBUSH,

Plaintiff,

vs. In Equity

HERMAN H. HELBUSH, No. S-40-C

Defendant.

PETITION FOR APPEAL

TO THE HONORABLE, GEORGE COSGRAVE, JUDGE OF THE UNITED STATES DISTRICT COURT:

The above named plaintiff, GWYNETH HELBUSH, feeling aggrieved by the decision and order of the Court

made and entered on the 24th day of February, 1931, dismissing plaintiff's bill of complaint heretofore filed herein and without leave to said plaintiff to amend said bill of complaint, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set forth in the assignment of errors filed herewith and she prays that her plea be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, under the rules of said Court in such case made and provided and your petitioner further prays that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said United States Circuit Court of Appeals and that the proper order relating to and fixing the amount of security to be required of her be made.

Dated: March 20th, 1931.

Harry I. Stafford
George Clark
Attorneys for Plaintiff.

[Endorsed]: In Equity No. S-40-C In the Central Division of the United States District Court, In and for the Southern District of California Gwyneth Helbush Plaintiff, vs Herman H. Helbush, Defendant. Petition for Appeal Filed Mar 24 1931 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk George Clark, Harry I Stafford Attorney at Law Flood Building San Francisco.

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

GWYNETH HELBUSH,

Plaintiff,

vs. In Equity

HERMAN H. HELBUSH, No. S-40-C

Defendant.

ASSIGNMENT OF ERRORS

Now comes GWYNETH HELBUSH, the plaintiff in the above entitled action, and contends that, in the record, opinion, decision and final judgment in said cause, there is manifest and material error, and in connection with, and as a part of her appeal herein, makes and files the following assignment of errors upon which she will rely in the prosecution of her appeal in said cause:

—1—

That the United States District Court for the Southern District of California erred in deciding that plaintiff's complaint did not state facts sufficient to constitute a cause of action against the defendant.

—2—

That said Court erred in deciding that plaintiff's complaint did not state facts sufficient to entitle plaintiff to any relief against defendant.

—3—

That said Court erred in deciding that plaintiff's complaint did not raise any Federal questions.

—4—

That said Court erred in deciding that plaintiff's complaint did not state facts sufficient to confer upon said Court jurisdiction either as to the parties or the subject matter of said action.

—5—

That said Court erred in deciding that upon the facts as alleged in plaintiff's complaint no question arises under the Constitution of the United States and that no constitutional question is involved in the facts so alleged.

—6—

That said Court erred in deciding that under the facts, as alleged in plaintiff's complaint, there has been no violation of Section One of the Fourteenth Amendment to the Constitution of the United States in respect to the provision therein for due process of law.

—7—

That said Court erred in deciding that under the facts, as alleged in plaintiff's complaint, all matters so alleged had been fully litigated between plaintiff and defendant to a final determination in the Courts of the State of California, which had and have jurisdiction of the parties and of the subject matter of plaintiff's complaint.

—8—

That said Court erred in granting defendant's motion to dismiss without leave to plaintiff to amend her complaint.

—9—

That said Court erred in refusing to deny defendant's motion to dismiss.

WHEREFORE, plaintiff prays that said order and judgment be reversed and that an order be entered reversing the order and judgment of the District Court in

said cause and that said Court be directed to render and enter judgment denying defendant's motion to dismiss.

Dated: San Francisco, March 20th 1931.

Harry I. Stafford
George Clark
Attorneys for Plaintiff.

[Endorsed]: In Equity No. S-40-C In the Central Division of the United States District Court, In and for the Southern District of California. Gwyneth Helbush, Plaintiff, vs Herman H. Helbush, Defendant. Assignment of Errors. Filed Mar 24 1931 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk George Clark, Harry I. Stafford Attorney at Law Flood Building San Francisco

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IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

GWYNETH HELBUSH,

Plaintiff,

vs. In Equity

HERMAN H. HELBUSH, No. S-40-C

Defendant.

ORDER ALLOWING APPEAL

Upon motion of Harry I. Stafford and George Clark, attorneys for the petitioner and plaintiff, Gwyneth Helbush, and upon filing the petition of said plaintiff for appeal, IT IS ORDERED that an appeal be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the order

and judgment entered herein on the 24th day of February, 1931, in favor of defendant and against plaintiff and that the amount of the bond, as required by law, on said appeal be, and the same is hereby fixed in the sum of Two hundred fifty (250) Dollars and said bond shall act as a supersedeas and cost bond pending the outcome of said appeal.

Dated: March 24th, 1931.

Geo Cosgrave
JUDGE.

[Endorsed]: In Equity No. S-40-C In the Central Division of the United States District Court, in and for the Southern District of California. Gwyneth Helbush, Plaintiff, vs Herman H. Helbush, Defendant. Order allowing appeal Filed Mar 24 1931 R. S. Zimmerman, Clerk By M. L. Gaines, Deputy Clerk. George Clark, Harry I Stafford Attorney at Law Flood Building San Francisco

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IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

GWYNETH HELBUSH,

Plaintiff,

vs. In Equity

HERMAN H. HELBUSH, No. S-40-C

Defendant.

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, GWYNETH HELBUSH, as Principal, and EDWARD A. CUNHA and DEAN CUNHA, as Sure-

ties, are held and firmly bound unto HERMAN A. HELBUSH, in the sum of Two hundred and fifty Dollars ($250.00) to be paid to the said HERMAN H. HELBUSH, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents

SEALED with our seal and dated this 26th day of MARCH, 1931.

WHEREAS, lately at a District Court of the United States for the Southern Division of the Southern District of California, in a suit pending in said court between Gwyneth Helbush, plaintiff and Herman H. Helbush, defendant, a judgment and decree was rendered against the said plaintiff on the 24th day of February, 1931, dismissing plaintiff's bill of complaint theretofore filed therein; and

WHEREAS, the said plaintiff, Gwyneth Helbush, having obtained from said court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said HERMAN H. HELBUSH citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty days from the date of said citation;

NOW, THEREFORE, the condition of this obligation is such that if the said plaintiff, Gwyneth Helbush shall prosecute her said appeal to effect and reverse the said judgment against her or shall pay, or cause to be paid all damages and costs if she fail to make her plea good,

then the above obligation shall be void; otherwise, to remain in full force and effect.

And further the undersigned Sureties agree that in case of a breach of any condition hereof, the above entitled court may, upon notice to the said Sureties of not less than ten days, proceed summarily in the above entitled cause to ascertain the amount which said Sureties are bound to pay on account of such breach and render judgment therefor against them, and each of them, and award execution thereof, not exceeding, however, the sums specified in this undertaking.

Edward A. Cunha
Dean Cunha
Gwyneth Helbush

STATE OF CALIFORNIA)
(SS.
CITY AND COUNTY OF SAN FRANCISCO)

EDWARD A. CUNHA and DEAN CUNHA, the Sureties named in and who executed the above bond, being duly sworn, each for himself, says:

That he is a resident and householder within the said State of California and is worth the sum specified in the said bond for which he is bound, over and above all his just debts and liabilities, exclusive of property exempt from execution.

Edward A. Cunha,
Dean Cunha

Subscribed and sworn to before me, this 31st day of March, 1931.

[Seal] Edward P. McAuliffe

Notary Public in and for the City and County of San Francisco, State of California.

The within and foregoing bond on appeal is hereby approved, both as to sufficiency and form.

Dated: March 31, 1931.

Sullivan, Roche, Johnson & Barry

Attorneys for Herman H. Helb*uh*.

The within and foregoing bond on appeal is hereby approved, both as to sufficiency and form.

Dated: Apr. 1 1931.

Geo Cosgrave

United States District Judge.

[Endorsed]: In Equity No. S-40-C. In the Central Division of the United States District Court, in and for the Southern District of California. Gwyneth Helbush, plaintiff, vs. Herman H. Helbush, defendant. Bond on Appeal. Filed Apr. 1, 1931. R. S. Zimmerman, Clerk, by Murray E. Wire, Deputy Clerk. George Clark, Harry I. Stafford, Attorney at law. Flood Building, San Francisco.

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GWYNETH HELBUSH,

Plaintiff,

vs. In Equity

HERMAN H. HELBUSH, No. S-40-C

Defendant.

AMENDED PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

Please prepare a record on appeal in the above entitled cause and include therein the following:

Bill of complaint, filed
Motion to dismiss, filed
Decision of Court on Motion to Dismiss,
Decree dismissing bill, filed February 24th, 1931.
Petition for appeal.
Assignment of errors.
Order allowing appeal.
Citation on appeal.
Bond on appeal.
This praecipe.
Dated: April 6th 1931.

George Clark
Harry I. Stafford
Attorneys for Plaintiff.

[Endorsed]: In equity No. S-40-C In the Central Division of the United States District Court, in and for the Southern District of California. Gwyneth Helbush, Plaintiff, vs Herman H. Helbush, Defendant. Amended Praecipe For Transcript of Record. Receipt of a copy of the within Amended Praecipe for Transcript of Record is hereby admitted this 6th day of April, 1931. Sullivan Roche Johnson & Barry, Attorneys for the Defendant. Filed Apr 8—1931 R. S. Zimmerman, Clerk George Clark, Harry I Stafford Attorney at Law Flood Building San Francisco

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

GWYNETH HELBUSH, Plaintiff - vs. - HERMAN H. HELBUSH, Defendant.	CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 28 pages, numbered from 1 to 28 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint; motion to dismiss bill; decision; decree dismissing bill; petition for appeal; assignment of errors; order allowing appeal; bond on appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certi-

fying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of April in the year of Our Lord One Thousand Nine Hundred and Thirty-one, and of our Independence the One Hundred and Fifty-fifth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6447

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GWYNETH HELBUSH,
Appellant,

vs.

HERMAN H. HELBUSH,
Appellee.

BRIEF FOR APPELLANT.

GEORGE CLARK,
Pacific Mutual Building, Los Angeles,
HARRY I. STAFFORD,
Flood Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 6447

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GWYNETH HELBUSH,

Appellant,

vs.

HERMAN H. HELBUSH,

Appellee.

BRIEF FOR APPELLANT.

FOREWORD.

This is an appeal by Gwyneth Helbush from a judgment of the United States District Court for the Southern District of California, Central Division, dismissing a bill of complaint brought by appellant against Herman H. Helbush, appellee, for the purpose of having a final decree of divorce, granted by the Superior Court of the State of California, vacated and set aside upon the ground that the same was entered against appellant in violation of certain constitutional rights.

STATEMENT OF THE CASE.

Appellant was granted an interlocutory decree of divorce against appellee in June, 1924, by the Su-

perior Court of the State of California, in and for the City and County of San Francisco. In August, 1924, the parties resumed marital relations and appellant condoned the offense of appellee upon which the interlocutory decree had been granted. The parties lived together until January, 1929, when appelle deserted appellant. On April 10, 1929, upon *ex parte* application of appellee a final decree of divorce was entered in the action brought in 1924, appellee at that time disclosing to the Court by the oral statement of his attorneys that the parties had been living together as man and wife from August, 1924, to January, 1929. Appellant upon hearing of said action immediately moved for the vacation of said decree upon the ground that said decree had been entered without any notice to her to which notice she was entitled because of the condonation and resumption of marital relations between the parties and that said Court was without jurisdiction to enter said decree. The motion was heard and denied and an appeal from said ruling was affirmed by the California Supreme Court on July 15, 1930. (*Helbush v. Helbush,* 209 Cal. 758.)

APPELLANT'S CONTENTIONS.

Appellant has made certain assignments of error on the part of the trial Court. Briefly stated, her contentions are that she has not had her day in Court in that she was deprived of notice and a right to be heard before the final decree of divorce was entered against her and that she has been deprived of her property and her status as wife without due process

of law, in that certain community property interests acquired by the parties during the period from 1924 to 1929, were, by the entry of the final decree of divorce, terminated adversely to her.

These contentions are based on the ground that the California Courts ignored the provisions of the California Civil Code, Sections 131 and 132, stating that the marital bonds are not severed by an interlocutory decree of divorce, and Section 111 of said Code stating that in the event of condonation, no divorce shall be granted and acting under Section 132 of said Code, entered a final decree of divorce *ex parte,* holding that said section authorizes the *ex parte* entry of a final decree of divorce after condonation, a ruling which, it is submitted, is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States and voids any judgment entered under such procedure.

ARGUMENT.

A. THE UNITED STATES DISTRICT COURT HAS JURISDICTION OF THIS SUIT.

The United States District Court has competent jurisdiction in equity to vacate and set aside an *ex parte* judgment of a state Court, void for want of authority to render it, either because prohibited by statute (Cal. Civil Code, Sec. 111) or in violation of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, especially if based upon a statute such as Section 132 of the Civil Code of California, construed by the state

Courts to authorize the *ex parte* judgment. The federal question presented gives the United States District Court the requisite jurisdiction, the value of the matter in controversy exceeding the sum of three thousand dollars.

U. S. Code, Title 28, Sec. 41;
Judicial Code, Sec. 24;
Simon v. Southern Railway, 236 U. S. 115, 122, 125, 126, 127, 132;
Ex parte Young, 209 U. S. 123.

B. DECREE OF DIVORCE VOID FOR WANT OF JURISDICTION.

The final decree of divorce is void for want of jurisdiction.

1. In the first place it is expressly prohibited by Section 111 of the Civil Code, there having been condonation by plaintiff of the extreme cruelty specified in the interlocutory decree. Proceedings in divorce are entirely statutory (9 *Cal. Jur.* 628) and therefore the statutory prohibition against divorce where there has been condonation is jurisdictional and a decree of divorce in violation of it is absolutely void. According to all the authorities on the point this is the well settled law.

Jones v. Jones, 59 Ore. 308, 312, 313;
Marsh v. Marsh, 13 N. J. Eq. 281, 286;
Byrne v. Byrne, 93 N. J. Eq. 5, 8, 9, 10;
19 *Corpus Juris* 87;
2 *Schouler on Mar. & Div.* (6th Ed.), Sec. 1690;
Long v. Superior Court, 102 Cal. 449, 452;
Windsor v. McVeigh, 93 U. S. 274, 282.

A decree that is void for want of jurisdiction is not due "process of law."

Scott v. McNeil, 154 U. S. 34, 46.

The affirmnance by the state Supreme Court of a void decree is itself null and void.

Ball v. Tolman, 135 Cal. 375, 380;

Pioneer Land Co. v. Maddux, 109 Cal. 633, 642.

It is also held by the authorities last cited that the Supreme Court's affirmance on the appeal cannot impart the slightest validity to the void decree.

2. The final decree of divorce having been given and made *ex parte,* without affording the plaintiff an opportunity to be heard against it, is in violation of her constitutional right to "due process of law," as conferred upon her by the Fourteenth Amendment of the Constitution of the United States.

Simon v. Craft, 182 U. S. 427, 436, 437;

Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236;

5 *Cal. Jur.* 875, 876;

10 *Am. & Eng. Ency. Law.,* 296, 300.

The plaintiff had a perfectly good defense against the final decree, by reason of the condonation nullifying the interlocutory decree and therefore *she had the constitutional right to a hearing before the final decree was made.* As she was not accorded this constitutional right, the decree is void. The law is so stated by the authorities last cited. The interlocutory decree, though an essential prerequisite to the validity of the final decree, is not a decree of divorce (9 *Cal. Jur.* 757, 758) and therefore, the paramount impor-

tance of the final decree in terminating the marriage by dissolution. Necessarily such a decree is in violation of constitutional right if *ex parte* in a case where there exists a perfectly valid defense to it, for instance, condonation since the interlocutory decree, the statute (Civil Code Sec. 111) expressly prohibiting a final decree of divorce in such cases.

3. And the Supreme Court having construed Section 132 of the Civil Code as sustaining the *ex parte* final decree, the statute is void because in conflict with the "due process of law" clause in the Fourteenth Amendment of the Constitution of the United States, in depriving the plaintiff of an opportunity to be heard against it prior to its rendition.

Simon v. Craft, 182 U. S. 427, 436, 437;
5 *Cal. Jur.* 875, 876;
10 *Am. & Eng. Ency. Law,* 296, 300.

And the United States District Court will set aside and vacate the *ex parte* final decree and issue an injunction against it; also against the party claiming under it.

Simon v. Southern Railway, 236 U. S. 115, 122, 125, 126, 127, 132;
Ex parte Young, 209 U. S. 123.

C. A COURT OF EQUITY HAS JURISDICTION TO ANNUL AND SET ASIDE A VOID JUDGMENT.

It is the well settled law that a Court of Equity has competent jurisdiction to annul and set aside a void judgment.

5 *Pomeroy's Eq. Jur.* (4th ed.) Secs. 2084, 2085, 2087, 2088;

3 *Freeman on Judg.* (5th ed.) Secs. 1182, 1198, 1201, 1227;
Simon v. Southern Railway, 236 U. S. 115;
Ex parte Young, 209 U. S. 123;
Jeffords v. Young, 98 Cal. App. 400, 407;
Bacon v. Bacon, 150 Cal. 477, 484, 485, 491;
Wilcke v. Duress, 144 Mich. 243.

Nor is the denial of a motion to set aside the void judgment, by the Court that rendered it, *res judicata* as against a subsequent bill in equity to vacate the judgment.

Lake v. Bonynge, 161 Cal. 120, 129, 131, 132;
Bacon v. Bacon, 150 Cal. 477, 484, 485, 491;
Estudillo v. Security Loan etc. Co., 149 Cal. 556, 563, 564, 565;
Herd v. Tuohy, 133 Cal. 55, 63;
3 *Freeman on Judg.* (5th ed.) Sec. 1198.

And in no case is a decision *res judicata* where the Court has refused to decide the question presented, the case here. A bill in equity to vacate a judgment is a direct attack upon it and being such the doctrine of *res judicata* can have no application.

15 *Cal. Jur.* 9.

D. CONCLUSION.

We submit that in view of the foregoing authorities, the appellant was deprived of her day in Court. That it is no answer that she was permitted to appeal to the Court to have the action already taken by that Court without notice to her, vacated and set aside and that it is of no moment how extensive a hearing

may have been had upon the proceeding to vacate and set aside the order already had. The violation of appellant's substantial rights occurred at the time the order was entered against her without notice and it is merely putting the cart before the horse to say that this violation can be remedied and cured by steps subsequently taken to vacate and set aside the void order.

In our opinion the judgment of the District Court should be reversed.

Dated, San Francisco,
September 28, 1931.

Respectfully submitted,
GEORGE CLARK,
HARRY I. STAFFORD,
Attorneys for Appellant.

No. 6447

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GWYNETH HELBUSH,
Appellant,

vs.

HERMAN H. HELBUSH,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GWYNETH HELBUSH,
Appellant,

vs.

HERMAN H. HELBUSH,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This case comes to this Court on appeal from a judgment of dismissal made and entered in the Central Division of the United States District Court in and for the Southern Division of California. The appellant there filed her Bill of Complaint in Equity in which she alleged that she and appellee intermarried in the State of California on the 9th day of March, 1923, that on the 14th day of January, 1924, appellee deserted her and she thereupon commenced an action for divorce in the Superior Court of the State of California in and for the City and County of San Francisco. Thereafter, on the 27th day of June, 1924, the interlocutory decree of said Superior Court was entered in favor of the appellant adjudging she was entitled to a divorce from appellee on the ground

of extreme cruelty. Appellant avers that she condoned the offense specified in the interlocutory decree and that the parties resumed marital relations until January 3, 1929, when appellee again wilfully deserted appellant. Appellant asserts that on the 10th day of April, 1929, appellee obtained ex parte, and without the knowledge or consent of appellant, and without notice to her, a final decree of divorce in said action. Thereafter appellant moved the Superior Court to set aside and vacate said decree of divorce and her motion was denied. From this ruling of the Superior Court she appealed to the Supreme Court of California and on the 15th day of July, 1930, the Supreme Court affirmed the order of the Superior Court. The appellant asked for a rehearing from the Supreme Court which was denied. The appellant claims she was denied due process of law under the Fourteenth Amendment of the Constitution of the United States. She pleads in her Bill in Equity that each of the jurisdictional, constitutional objections relied upon by her were urged before the said Superior Court on motion to vacate the final decree and before the Supreme Court of the State of California on the appeal. Appellant alleges that section 132 of the Civil Code of California is in violation of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, and prays that the final decree of divorce be declared void. We are aided in the relation of the marital troubles and the litigation of the parties by the opinion of the Supreme Court of the State of California in *Helbush v. Helbush,* 209 Cal. 758.

ARGUMENT.

The appellant to justify her application to the United States District Court, of necessity appeals to the Federal constitution and asserts she has been denied, under the Fourteenth Amendment by the Courts of the State of California, due process of law. What in reality she seeks is that the Federal Court shall interpose its strong arm as a court of error and appeals to revise decisions of the various courts of the State. She desires in a matter of procedure rather than one of jurisdiction to control the action of the State; and she seeks, as we think we shall demonstrate, after ample opportunity has been accorded her in the Courts of this State, to have their adverse decisions in matters wholly within the right of the State to determine, overruled now by a Federal tribunal. Efforts of this sort have not been uncommon, and the unbroken denial of them has made very clear the law upon the subject. It shall be our purpose to demonstrate this. But first very briefly is presented the California Courts' construction and interpretation of the sections of the Civil Code assailed by appellant.

I.

THE RIGHTS OF THE PARTIES HAVE BEEN FULLY LITIGATED AND FINALLY DISPOSED OF BY THE COURTS OF THE STATE OF CALIFORNIA.

Helbush v. Helbush, 209 Cal. 758.

The decision, although it is unnecessary upon this hearing to advert to questions of fact, very emphatically answers some of the allegations of appellant's

bill. It is there said, in affirming the decision of the Superior Court denying appellant's motion to set aside the decree of divorce:

> "On the hearing of the motion numerous affidavits and counter-affidavits were filed. The affidavits on behalf of the defendant, which the court had the right to believe, disclosed a course of immorality, dissipation and deception on the part of the plaintiff before and after the marriage of the parties and until their separation, January, 1929. It is unnecessary to engage in a recital of the sordid narrative of these affidavits. It is enough to say that the showing made on said hearing was not such as to move the conscience of the chancellor on behalf of the plaintiff, but on the contrary disclosed that the purpose of the plaintiff in seeking a reconciliation was not sincere nor in good faith and was made for the purpose of benefiting herself monetarily at the defendant's expense. We find no abuse of the court's discretion in denying the motion and the order must stand unless it be determined that the court had no power to enter, or committed reversible error in entering, the final decree in the absence of the affidavit required by rule of court."

The Supreme Court thereupon held the lower Court had the power, the jurisdiction, to enter the decree, and affirmed the judgment. It appears from the opinion, too, that the plaintiff had endeavored to set aside the interlocutory decree of divorce and her motion had been denied, and that on the day following the granting of the final decree appellant filed a notice of motion to set aside that final decree and upon this motion there was a full hearing. After the motion

had been denied, appellant appealed to the Supreme Court of the State where again she was defeated.

It will be observed thus that there was opportunity for hearing and full hearing in every phase desired by appellant and after opportunity for hearing and full hearing, a decision by the trial Court, and, upon appeal, a decision by the Supreme Court. These decisions she now seeks to reverse by a decision of the Federal Court.

II.

THE SECTIONS OF THE CIVIL CODE OF CALIFORNIA ATTACKED BY THE BILL HERE HAVE BEEN UPHELD BY THE COURTS OF THE STATE.

Sections 131 and 132 of the Civil Code of the State of California were approved March 2, 1903, and their constitutionality at once questioned. They were held to be constitutional in

Deyoe v. Superior Court, 140 Cal. 476.

It will be observed that Section 132 provides:

> "When one year has expired after the entry of such interlocutory judgment, *the Court on motion of either party, or upon its own motion,* may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has

been finally disposed of, nor then if the motion has been granted or judgment reversed," etc. (Italics ours.)

Section 131 of the Civil Code of California provides:

"In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce. After the entry of the interlocutory judgment neither party shall have the right to dismiss the action without the consent of the other."

In the decision of *Helbush v. Helbush* by the Supreme Court of the State of California it is stated that a motion was regularly made by the appellant to set aside the interlocutory decree and this motion was then denied. Obviously no appeal was taken either from the interlocutory decree itself or from the motion denying the application to set it aside.

An interlocutory decree, after the time for appeal has expired, becomes final.

In *Reed v. Reed,* 9 Cal. App. 752, it is said:

"In our opinion the legislature contemplated that the interlocutory decree should settle the question as to whether or not a divorce should be granted, and the question of the disposition of the property rights properly before the court, for the

reason that provision is made as in other cases for a new trial, for an appeal within six months with like effect as if the judgment were final."

And in the conclusion of the opinion we find, in referring to *Claudius v. Melvin,* this language:

"The court said in the latter case 'The judgment entered on September 4, 1903, therefore, constituted a valid interlocutory judgment, declaring the plaintiff entitled to a divorce. As such it was subject to be vacated on appeal or on motion for a new trial or by proceedings under Section 473 of the Code of Civil Procedure. The time for all of these proceedings having expired, and no such proceeding to vacate it having been instituted, the court thereupon lost all power by any proceeding in the case to modify or vacate the judgment so far as it constituted an interlocutory judgment.' "

Yet again the Appellate Court of California has said:

"It has been determined that in a divorce action under the provisions of our Code the function of an interlocutory decree includes not only the establishment of the right of the party to a divorce but includes, also, the hearing and final determination of the rights of the parties as to property. Any disposition of property rights made in connection with the hearing of the principal cause of action is regularly included in and becomes a part of the interlocutory decree. If no appeal be taken, such decree becomes final with respect to the property rights as well as with respect to the adjudged right to a divorce."

Newell v. Superior Court, 27 Cal. App. 344.

It has been so definitely determined in California that an interlocutory decree is final unless appealed from, and that a final decree may be entered upon motion of either party, that other citations would be a mere waste of the Court's time. The rule with the authorities may be found stated in

9 *Cal. Jur.*, 762,766.

We find, therefore, from the undisputed facts that an interlocutory decree of divorce settling all the rights of the parties was duly made and entered; that subsequently before the Court rendering this interlocutory decree a motion was made by appellant to set it aside and this motion was denied; that the interlocutory decree became final; that a judgment of divorce based thereon and in accordance therewith was duly made by the Court rendering the interlocutory decree; that the day following this judgment appellant moved to set the same aside; that there was full hearing and full opportunity to be heard on said motion; that the motion was denied after full hearing by the trial Court; that appellant thereupon appealed to the Supreme Court of the State from the order denying her motion; that after full hearing before the Supreme Court, the judgment of the Superior Court was affirmed. The mere statement of these facts is the refutation of appellant's claim she has been denied due process of law.

III.

CONCEDING FOR THE SAKE OF THE ARGUMENT THE CLAIM OF APPELLANT AS TO LACK OF OPPORTUNITY TO BE HEARD IN THE FIRST INSTANCE UPON THE ENTRY OF THE FINAL DECREE OF DIVORCE, HER MOTION TO SET THE DECREE ASIDE AND THE SUBSEQUENT FULL OPPORTUNITY FOR HEARING AND APPEAL BY HER ARE CONCLUSIVE.

Of course, it cannot be for an instant conceded that any constitutional question arises from the entry of the final decree of divorce upon the motion of appellee. The procedure was that authorized by California, interpreted, construed and approved by the California Courts. But even if there were any merit whatsoever in the position assumed by appellant, which, of course, there is not, the motion immediately thereafter made by her to set aside the final decree, the full opportunity accorded her upon that motion, the evidence taken and the hearing had, the judgment of the trial Court thereafter, her appeal to the Supreme Court and its judgment, conserved every legal right she had and removed the case from the imaginative realm of a constitutional deprivation.

This has been decided by the Supreme Court of California in

Thomas v. San Diego College Co., 111 Cal. 365,

where it is said:

> "But it is contended that the first order was granted upon the ex parte application of defendant Stough, and that plaintiffs have not consented to or ratified the order. Whether the court erred in granting the order without notice need not be considered, as plaintiffs were heard upon the mo-

tion to recall the order or to stay its execution; and if their motion was properly denied, they were not prejudiced by the first order."

See, also, with a discussion of the subject:

Kilpatrick v. Horton, 89 Pac. 1035;
Balfe v. Rumsey Co., 133 Pac. 417;
Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220.

Of course, in the case at bar there was no jurisdictional defect, but the few cases above are cited from the long unbroken line, to demonstrate that even were there any such defect originally, it was wholly cured by the proceeding instituted by appellant upon which there was full hearing and determination.

IV.

DUE PROCESS.

Section 1 of Article IV of the Constitution of the United States invoked by appellant has been so often construed that no longer can there be the slightest doubt as to the general rules of interpretation. These we find to be:

1. The due process clause of the Constitution does not control mere forms of procedure in state courts or regulate practice therein.

2. If the essential elements of notice and of opportunity to defend are present, the United States Supreme Court will accept the interpretation given by the State Supreme Court as to the regularity under

a state statute of the practice pursued in a particular case.

3. Where a party has appeared and has been heard in a proceeding, there is no color for his contention that he has been deprived of his property without due process of law.

The Supreme Court of the State of California in a recent case expressed with clarity its view of the provision of the Federal Constitution here in question, as related to State proceedings, in this language:

> "(20-25). The contention is also advanced here that the action of the trial court in entering the judgment amounted to a denial of 'due process.' The contention is untenable. Due process of law is law in its regular administration through courts of justice, and means 'a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' (Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565); 'and when secured by the law of the state the (federal) constitutional requirement is satisfied.' (Leeper v. Texas, 139 U. S. 462, 468, 11 S. Ct. 577, 579 (35 L. Ed. 225).) A state cannot be deemed guilty of a violation of the federal constitutional provision relating to due process because one of its courts, while acting within its jurisdiction, has made an erroneous decision. Arrowsmith v. Harmoning, 118 U. S. 194, 6 S. Ct. 1023, 30 L. Ed. 243. Any irregularities in procedure are matters for the consideration of the judicial tribunal within the state empowered by the law of the state to review and correct error committed by the courts. Iowa Cen-

tral Ry. Co. v. Iowa, 160 U. S. 389, 393, 16 S. Ct. 344, 40 L. Ed. 467. Due course of law under the state Constitution and due process of law under the Federal Constitution mean the same thing. Griggs v. Hansom, 86 Kan. 632, 634, 121 P. 1094, Ann. Cas. 1913C, 242, 52 L. R. A. (N. S.) 1161. It is the right of a litigant to have his cause tried and determined under the same rules of procedure that are applied to other similar cases, and when this is afforded to him he has no ground to complain the due process of law is not being observed. Estate of McPhee, 154 Cal. 385, 390, 97 P. 878. * * * The notice essential to due course and process of law is the original notice whereby the court acquires jurisdiction, and is not notice of the time when jurisdiction, already completely vested, will be exercised. The court having once acquired jurisdiction, 'however wrong the result of the proceeding may be, missteps occurring in the course of it constitute irregularities and errors in procedure only, and * * * cannot be conjured into anything graver by the use of impressive and high-sounding characterizations.' Griggs v. Hansom, supra: Cramer v. Farmers' State Bank, 98 Kan. 641, 158 P. 1111. Whether notice of subsequent proceedings, after the court has acquired jurisdiction by original process, will or will not be required is a matter of legislative discretion. After jurisdiction has attached, the party has no constitutional right to demand notice of further proceedings. Estate of McPhee, supra; Brown & Bennett v. Powers, 146 Iowa, 729, 732, 125 N. W. 833; Savage v. Walshe, 246 Mass. 170,184, 140 N. E. 787. If the defendant in the original action was entitled, by statute or rule of court, to notice of the entry of default

> and application for the judgment, want of such notice does not render the judgment void. Egan v. Sengpiel, 46 Wis. 703, 709, 1 N. W. 467."
>
> *Gray v. Hall,* 265 Pac. (Cal.) 252, 253.

It is submitted that the appellant has confounded what she believes to be an erroneous decision with a jurisdictional question. With her consent, jurisdiction was conferred on the Superior Court of the State of California to try her case. Jurisdiction vested in that Court, and an interlocutory decree, which she permitted to become final, was rendered. The Court never lost jurisdiction, however much she may assert it erred in its decision while exercising its jurisdiction. As stated in the opinion quoted, notice of subsequent proceedings after the Court has acquired jurisdiction will or will not be required as a legislative discretion may determine. But in this case we may go far beyond this, because of the full hearing accorded appellant in the motion to set aside the final decree of divorce upon many grounds.

The United States Supreme Court, in a case decisive of that at bar,

> *Rooker v. Fidelity Trust Co.,* 263 U. S. 413; 68 L. Ed. 362,

has said:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court (the State court of Indiana) had jurisdiction of both the subject-matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the

> State on an appeal by the plaintiffs. 191 Ind. 141, 131 N. E. 769. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. * * * Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, Sec. 237, as amended September 6, 1916, chap. 448, Sec. 2, 39 Stat. at L. 726, Comp. Stat. Sec. 1214, Fed. Stat. Anno. Supp. 1918, p. 411. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original. Judicial Code, Sec. 24. * * * Some parts of the bill speak of the judgment as given without jurisdiction and absolutely void; but this is merely mistaken characterization. A reading of the entire bill shows indubitably that there was full jurisdiction in the state courts, and that the bill, at best, is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction."

We might well paraphrase the language of the United States Supreme Court and say concerning the complaint in this case that it indubitably shows jurisdiction in the state court and that at best it is merely an attempt to get rid of the judgment for alleged

errors of law committed in the exercise of that jurisdiction.

We quote from a few of the leading cases of the United States Supreme Court.

> "Due process of law is process due according to the law of the land. The process in the States is regulated by the law of the State."
>
> *Walker v. Sauvinet,* 92 U. S. 90; 23 L. Ed. 678.

> "Due process of law is process according to the law of the land. This process in the states is regulated by the law of the state. * * * Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States exercised within the limits therein prescribed and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state, which derives its authority from the inherent and reserve powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."
>
> *Hurtado v. People of California,* 110 U. S. 516, 28 L. Ed. 232.

Again we find this emphatic declaration:

> "The Supreme Court of the State in a number of decisions has considered that section to mean that an heir is not a necessary party with the administrator. Cunningham v. Ashley, 45 Cal. 485;

> Bayly v. Muehe, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; Finger v. McCaughey, 119 Cal. 59, 51 Pac. 13; Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704. This is conceded by plaintiffs in error, but they say that because Para. 1582 of the Code of Civil Procedure 'is made the basis of the rule established by the Supreme Court of the State,' they complain of it, and respectfully urge that it 'is repugnant to the 14th Amendment of the Constitution of the United States, Sect. 1.' This is equivalent to saying that the legislative power of the state, being the source of the rights and the remedies, has so dealt with one as to make the other repugnant to the Constitution of the United States; or, if the complaint be of the decisions, that the Supreme Court of the State cannot construe the laws of the State and make of them a consistent system of jurisprudence, accommodating rights and remedies. Both contentions are so clearly untenable that further discussion is unnecessary."
>
> *McCaughey v. Lyall,* 224 U. S. 558, 564, 56 L. Ed. 883.

The State Court's decision is controlling is uniformly held by the United States Supreme Court. Thus we find it stated:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. * * * The questions presented, other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law

of the state and the state court's decision of them is controlling."

Enterprise Irrig. District v. Farmers Mut. Canal Co., 243 U. S. 157, 166, 61 L. Ed. 644.

"The assignment (due process), however, has no substance in it. The parties to this action have been fully heard in the state court in the regular course of judicial proceedings, and in such a case the mere fact that state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382.

In an action where two judgments, one interlocutory and the other final had been rendered, the Court said:

"The case had been before the supreme court of the state on a prior appeal, and the court had then construed the trust agreement and dealt in a general way with the rights of the parties under it. Rooker v. Fidelity Trust Co., 185 Ind. 172, 109 N. W. 766. Referring to this, the plaintiffs, by way of asserting another ground for the writ of error, claim that, on the second appeal, the court took and applied a view of the trust agreement different from that taken and announced on the first appeal, and that this change in decision impaired the obligation of the agreement, contrary to the contract clause of the Constitution (118) of the United States, and was a violation of the due process and equal protection clauses of the 14th Amendment. Plainly, this claim does not bring the case within the writ of

error provision. Both decisions were in the same case. *The first was interlocutory* (185 Ind. 187, 188); *the second final. Concededly the case was properly before the court on the second appeal; the plaintiffs evidently thought so, for they took it there.* Whether the second decision followed or departed from the first, it was a judicial act, not legislative. The contract clause of the Constitution, as its words show, is directed against impairment by legislative action; not against a change in judicial decision. It has no bearing on the authority of an appellate court, when a case is brought before it a second time, to determine the effect to be given to the decision made when the case was first there."

Rooker v. Fidelity Trust Co., 261 U. S. 114, 67 L. Ed. 556.

The Federal Courts will not revise the decisions of State Courts, of course. In a recent case the Supreme Court held:

"Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. 'The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.' Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 165, 166, 61 L. Ed. 644, 649, 37 Sup. Ct. Rep. 318."

American Railway Exp. Co. v. Kentucky, 273 U. S. 269, 71 L. Ed. 639.

The principle involved in the question of whether or not the Federal Constitution has been violated by the State Courts is most ably and succinctly stated in

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. Ed. 91,

where it is said:

> "If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case as long ago as 1847, 'It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.' Commercial Bank of Cincinnati v. Buckingham, 46 U. S. 5 How. 317, 343 (12:169, 181); Lawler v. Walker, 55 U. S. 14 How. 149, 154 (14:364, 366).
>
> It was said by Mr. Justice Miller, in delivering a later judgment of this court: 'We are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state could be brought here, where the party setting up a contract alleged that the court had

taken a different view of this obligation to that which he held.' Knox v. Exchange Bank, 79 U. S. 12 Wall. 379, 383 (20: 414, 415).

The same doctrine was stated by Mr. Justice Harlan, speaking for this court, as follows: 'The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state Constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question.' Lehigh Water Co. v. Gaston, 121 U. S. 388, 392 (30: 1059, 1060).

* * * When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States. Walker v. Sauvinet, 92 U. S. 90 (23; 678); Head v. Amoskeag Mfg. Co., 113 U. S. 9, 26 (28: 889. 895); Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162, 171 (36: 925, 930); Bergemann v. Backer, 157 U. S. 655 (39: 845)."

The State always may provide its own method of procedure.

> "The state, keeping within constitutional limitations, may provide its own method of procedure and determine the methods and means by which such laws may be made effectual. The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution."
>
> *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, at 107, 53 L. Ed. 429.

A Massachusetts decision quoting the well known *Twining v. New Jersey* case, held:

> "(6) The statute here assailed is not violative of the due process clause of the Fourteenth Amendment. The governing principle was stated with affluent citation of supporting authorities in Twining v. New Jersey, 211 U. S. 78, at pages 110, 111, 29 S. Ct. 14, 24 (53 L. Ed. 97), in these words:
>
> 'Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, * * * and that there shall be notice and opportunity for hearing given the parties. * * * Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and

methods of trial, and held them to be consistent with due process of law.' ''

Vallavanti v. Armour & Co., 162 N. E. (Mass.) 690, 691.

It must be kept in mind that the constitutional provision is

"Nor shall any *state* deprive any person of property without due process of law."

If the *state* has provided a mode for the determination of specific questions and that mode is pursued by parties litigant, no constitutional question arises.

The language of the decision in

Arrowsmith v. Harmoning, 118 U. S. 196, 30 L. Ed. 243,

makes this very plain thus:

"The statute under which the court acted would, if followed, have furnished Arrowsmith all the protection which had been guaranteed to him by the Constitution of the United States. The bond in question was matter of procedure only; and if it ought to have been required, the court erred in ordering the sale without having first caused it to be filed and approved. At most, this was an error of judgment in the court. The constitutional provision is 'Nor shall any *State* deprive any person of life, liberty, or property without due process of law.' Certainly a State cannot be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The Legislature of a State performs its whole duty under the Con-

stitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings."

See, also,

Savage v. Walshe (Mass.), 140 N. E. 787-792.

Two cases have recently been decided by the United States Supreme Court wherein very briefly the due process clause of the Constitution is construed.

Ohio ex rel. Bryant v. Akron, etc., 281 U. S. 74, 74 L. Ed. 710;

Dohany v. Rogers, 281 U. S. 362, 74 L. Ed. 904.

In the *Ohio* case Chief Justice Hughes, speaking for the Court said:

"As to the due process clause of the 14th Amendment it is sufficient to say that as frequently determined by this court the right of appeal is not essential to due process provided that due process has already been accorded in the tribunal of first instance." (Citing cases.)

"The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the common pleas court and again in the court of appeals plainly satisfied the requirement of the Federal Constitution in this respect, and the state was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy."

In the latter case Mr. Justice Stone, speaking for the Court said:

> "The due process clause does not guarantee to the citizen of a State any particular form or method of State procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

In a case where a New York State Court appointed a receiver of a defendant husband's property based upon a decree for alimony rendered in New Jersey and the husband asserted that he was deprived of his property without due process of law, Mr. Justice Gray, speaking for the United States Supreme Court, said:

> "The husband, as the record shows, having appeared generally in answer to the petition for alimony in the court of chancery in New Jersey, the decree of that court for alimony was binding upon him. * * * The Court of New York having so ruled thereby deciding in favor of the full faith and credit claimed for that decree under the Constitution and laws of the United States its judgment on that question cannot be reviewed by this court on writ of error. The husband having appeared and been heard in the proceeding for alimony, there is no color for his present contention that he was deprived of his property without due process of law."
>
> *Lynde v. Lynde,* 181 U. S. 183, 45 L. Ed. 810.

Authorities of the character of those cited might be multiplied indefinitely. We have sought to refer only to a few leading cases which make very clear that no question of due process of law under the Federal Constitution arises here. We do not attempt a detailed exposition of the authorities cited in appellant's brief for the most casual reading of them demonstrates they do not touch the real point in issue here. For instance, it will be observed that in *Louisville & N. R. Co. v. Schmidt,* 177 U. S. 230, cited by appellant, Mr. Justice White commences his opinion with a statement of the law as follows:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

In

Simon v. Craft, 182 U. S. 427,

cited by appellant, Mr. Justice White again says:

> "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form."

The United States cases cited by appellant have no application to the case at bar.

CONCLUSION.

The obvious attempt of the appellant to make of the Federal Court a Court of Appeal from the Supreme Court of the State of California, it is respectfully urged ought not to be countenanced. In the appropriate tribunals, the forum selected by appellant herself, the differences between her and her husband have been fully adjudicated, and the adjudication rests not alone upon the decision of one Court, but of substantially every Court of record in the State of California. The code provisions under which the appellant originally sought relief, and under which the Courts of California ultimately rendered their decisions, have established the rule of procedure in divorce cases. These were invoked by the appellant in the first instance, and by the appellee latterly exactly as the code sections provide, and they have been declared to be but the methods of procedure in divorce cases by the Courts of California, and their validity and constitutionality upheld. It is this situation which makes impossible appellant's bill in this Court.

Appellant in the Courts of the State of California has had her day. No step in even the procedure, but in one fashion or another, she has had full opportunity to be heard, and has been fully heard. Through each Court of the state the sordid case has dragged its length. In each Court there has been after full presentation, decision upon the merits and the law. To transmute the regular proceedings of the State Courts into a mere detail of review by the Federal Court would be a reproach to our jurisprudence.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
October 17, 1931.

SULLIVAN, ROCHE, JOHNSON & BARRY,
Attorneys for Appellee.

No. 6449

United States

Circuit Court of Appeals

For the Ninth Circuit.

H. STANLEY BENT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] DOCKET No. 18,458.

H. STANLEY BENT

vs.

COMMISSIONER OF INT. REV.

For Taxpayer: W. H. TEASLEY, C. P. A.
JULIUS V. PATROSSO, Esq.

For Commissioner: J. W. MATHER, Esq.

DOCKET ENTRIES.

1926.

Jul. 12—Petition received and filed.

Jul. 14—Copy of petition served on Solicitor.

Jul. 14—Notification of receipt mailed taxpayer.

Aug. 30—Answer filed by G. C.

Sept. 4—Copy of answer served on taxpayer—Gen. Cal.

1928.

July 12—Hearing date set Dec. 10, 1928.

Aug. 23—Order placing proceeding on Los Angeles, Calif., or vicinity (circuit calendar) entered.

1929.

May 16—Hearing set July 8, 1929, Los Angeles, Calif.

July 8—Hearing had before John M. Sternhagen, Div. 10, on merits. Answer amended. Motion to amend petition denied. Stipulation filed. Briefs due Oct. 7, 1929.

Aug. 15—Transcript of hearing of July 8, 1929, filed.

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*Page-number appearing at the top of page of original certified Transcript of Record.

Sept. 26—Brief filed by G. C.

Oct. 4—Brief filed by taxpayer.

July 29—Motion to have decision reviewed by Board filed by taxpayer.

1930.

Feb. 28—Findings of fact and opinion rendered, John M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

Apr. 21—Notice of settlement filed by G. C.

Apr. 28—Notice of settlement filed by G. C.

May 1—Hearing set May 21, 1930, on settlement.

May 12—Consent to settlement filed by taxpayer.

May 14—Judgment entered, John M. Sternhagen, Div. 10.

Oct. 31—Petition for review to U. S. Circuit Court of Appeals, 9th Cir., with assignments of error filed by taxpayer.

Oct. 31—Proof of service filed.

Oct. 31—Praecipe filed by taxpayer.

Oct. 31—Proof of service filed.

Dec. 13—Motion for enlargement of time to 2–28–31 to prepare and deliver record filed by taxpayer.

Dec. 16—Order enlarging time to Feb. 28, 1931, for preparation of evidence and delivery of record entered.

1931.

Feb. 7—Agreed statement of evidence lodged.

Feb. 25—Order enlarging time to March 31, 1931, for preparation of the evidence and delivery of the record entered.

Mar. 2—Agreed statement of evidence approved and ordered filed.

Now, March 19, 1931, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[2] Filed Jul. 12, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 18,458.

H. STANLEY BENT, 418 S. Pecan St., Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

1. The above-named taxpayer appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter dated May 13, 1926 (IT:PA:PYA:60–D–ARM.) and as the basis of his appeal sets forth the following:

(a) H. Stanley Bent, the taxpayer, is a citizen and resident of the State of California and his address is 418 S. Pecan Street, Los Angeles, California.

(b) The taxpayer is a member of the firm of Bent Brothers, who are engaged in the business

of constructing dams, reservoirs, canals and other similar works.

(c) The deficiency letter, a copy of which is attached (Exhibit "A"), discloses a deficiency only for the year 1920. This is erroneous. The letter should have included the year 1922. The deficiency for both of these years affects the years 1919 and 1921. The tax shown as properly due on the face of taxpayer's return for year 1922, based on the income reported, was $65,177.80. Due to an error in addition of the tax only the item of $160.00, [3] being 4% upon $4,000.00, was added as $1,600.00, showing an error in addition of $1,440.00. The taxpayer contends that this amount should be deducted and allowed as a credit before a determination of his tax is begun, and that any change in the correct amount of the tax based on the income reported is a determination of a deficiency or an overassessment.

The Commissioner's representative, in examining the books of Bent Brothers for the year 1922, increased the income of said partnership for the year 1922 in the sum of $2,718.17 and as a result of the increase in said partnership income the net taxable income of this taxpayer was increased in the sum of $1,287.84. Therefore, the Commissioner determined a deficiency in tax due from this taxpayer for the year 1922. The Revenue Act of 1926 (274 (f)) provides:

> "If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess

> of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered, ... a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice. . . . . "

In line with the foregoing section of law, it is not believed by this taxpayer that a mathematical error merely in the addition of amount of tax as shown on the taxpayer's return should operate to defeat the right of this taxpayer in an appeal to the Board, when the Commissioner has determined an amount of tax in excess of that correctly shown by the return. A deficiency, therefore, for the year 1922, in the amount of $768.98, has been determined by the Commissioner.

[4] 2. The deficiency asserted by the Commissioner represents income taxes for the year 1920 in the amount of $12.73 and for the year 1922 in the amount of $768.98.

3. The Commissioner erred in the following specific instances:

(a) The disallowance of a part of a net loss sustained by the taxpayer in the year 1919. This loss was reduced in amount by the elimination of interest and taxes paid in the year 1919 by the taxpayer.

(b) The disallowance of expenses of the partnership relating to certain contracts. These expenses accrued in the year 1920 in the sum of $1,102.40 and in 1921 in the sum of $2,013.27, a total of $3,115.67,

which amount was chargeable to cost of contracts in process, and which contracts extended over a period begun in 1920 and ended in 1922.

(c) The disallowance to the partnership, Bent Brothers, of which this taxpayer is a member, of the right to treat unit contracts on a unit basis in determining the net distributive share of this taxpayer in the net income of the partnership for the years 1919, 1920, 1921 and 1922; the Commissioner specifically erred in this particular in that his treatment of these contracts upon a long term contract basis does not truly reflect the net taxable income of said partnership for the years stated and, therefore, results in an erroneous determination of the tax liability of this taxpayer upon his distributive share of the net income of said partnership for the years 1920 and 1922.

4. The facts upon which this taxpayer relies:

(a) A copy of a report covering examination of the income tax liability of the taxpayer for the years 1920, 1921 and 1922 [5] by a revenue agent and a copy of a report by a revenue agent covering examination of Bent Brothers, a partnership, to determine the distributive shares of the net income of the members for the years 1920, 1921 and 1922 are attached hereto and made a part of this petition, being marked Exhibit "B" and Exhibit "C."

(b) Taxpayer sustained a loss for the year 1918 in his business in an amount in excess of all other income. Taxpayer sustained a net loss in the operation of his business in the year 1919, which net loss due to a net loss having been sustained for the year

1918, was allowable as a deduction against net income of the taxpayer for the year 1920 under the provisions of Section 204 (b) of the Revenue Act of 1918. Taxpayer realized a net profit in the year 1920 and sought to deduct the net loss for the year 1919. The Commissioner has denied the deduction of a part of said net loss by applying the provisions of the Revenue Act of 1921, whereas the net loss accrued under the Revenue Act of 1918. The provisions of the Revenue Act of 1921, as relates to a net loss, do not apply until subsequent to December 31, 1920, as is stated in Section 204 (b) of the Revenue Act of 1921. Attention is directed to page 3 of Exhibit "B," wherein is shown the deduction of interest in the sum of $175.00, and taxes in the sum of $75.00 as unallowable items in determining the net loss for the year 1919 under the Revenue Act of 1918.

(c) During the years 1918 to 1922 inclusive, this taxpayer was engaged in the business of farming; in the business of renting properties owned by him; in the business of assisting in the conduct of the operations of Bent Brothers, a partnership, from which partnership he drew a salary, and had the interest and taxes upon his [6] home exceeded his said salary, the net loss therefrom would have been as much a net loss from a business regularly carried on by the taxpayer, as from his farming operations or from his loss from the operation of the partnership. The whole of the activities of this taxpayer, therefore, constitute his business, and the net loss therefrom includes the interest and taxes paid. The

money borrowed on which the interest was paid was used in taxpayer's trade or business and the mere fact that his home was pledged as security for the payment of the principal does not exclude this interest as a business expense.

(d) Taxpayer is a member of the firm of Bent Brothers, General Contractors, who are engaged particularly in the construction of dams, reservoirs, pipe lines, waterworks, drainage systems, and similar works. The contracts executed by said partnership are, therefore, for the excavation of earth, loose rock, solid rock, and the placement of concrete and steel for reinforcing concrete. In contracts relating to the laying of pipe lines and the construction of reservoirs the details cover excavation of earth, placement of cement in lining reservoirs, placement of concrete in lining drainage systems, and laying concrete pipe. These contracts are all based on the unit plan. The sales price of the Contractor, Bent Brothers, is based exclusively on cubic yards of excavation and cubic yards of concrete placed, on pounds of steel placed for reinforcing, on cubic yards of excavation in the digging of ditches, on lineal feet of concrete pipe laid in such ditches, on cubic yards of excavation of drainage canals, and on cubic yards of concrete placed in lining drainage canals.

(e) The contracts carried out by Bent Brothers all provide for monthly settlement on the number of units moved or placed, the unit being yard of excavation, yard of concrete, pounds of [7] steel, and lineal foot of concrete pipe specified as to diam-

eter measurement. These monthly settlements, the contracts provide, shall be made upon the certificate of the engineer in charge, such engineer representing the party for whom the contract is being executed.

(f) Prior to the entering into a contract for the construction of a dam, for instance, Bent Brothers prepared an estimate of the cost and in said estimate provided in analysis form for all of the expenses connected with the construction of said dam, including salaries to partners, general office expenses and other items of general overhead which could not be directly applied to each unit, and along with the direct expenses determined in advance the approximate cost of moving each yard of earth or rock in excavating, and the cost of placing each yard of concrete in constructing the foundation and walls of the dam. This estimate was the basis of their bid upon the construction of said dam. It was necessary that the estimate submitted to the owner intending to construct said dam conform to the specifications prepared by owner's engineers. These bids were not for a lump sum but were based on a unit price per cubic yard of earth or rock excavated and of concrete placed. The contract provided that the contractor (Bent Brothers) should be paid each month for each yard of excavation of earth or rock, and for each yard of placement of concrete, irrespective of what proportion such monthly yardage bore to the whole of the contract.

(g) Bent Brothers kept complete and definite records upon each contract and determined as the

work progressed the cost of each yard of excavation of earth or rock and the cost of placement of each yard of concrete or pound of steel. These records are available and were available to the representative of the Commissioner. [8] These accounts are compiled from actual transactions and are built upon the methods usually followed by similar contractors in determining the unit cost of excavation of earth and rock and placement of concrete.

(h) The contracts provided that the owner's engineer should determine each month the number of units of earth or rock excavated or concrete or steel placed, and should render a certificate to the owner and contractor and that based upon said certificate the owner should pay to the contractor the agreed price for the number of units moved or placed. These determinations by said engineer were made the basis of monthly settlements. The cost to the contractor of the work produced to date in conjunction with the determinations of the engineer in charge enabled Bent Brothers to determine definitely each month or at the end of a calendar year (Bent Brothers reported as a partnership on a calendar year basis) the exact cost and sales price of the work done to the close of the year.

(i) Attached and made a part of this petition (Exhibit "D") is copy of a contract entered into on the 20th day of September, 1920, for the construction of a flood control dam known as the San Dimas Dam. This contract shows the conditions under which the contracts of this nature are performed, which differ from long-term contracts, as usually

applied, in that the work may be discontinued at any time without the owner incurring liability except to pay for the actual units moved or placed to such date.

(j) It is admitted that the general financial books of the partnership were not carried in accordance with the cost determination. These books did not, therefore, truly reflect the income of the partnership. The books and records were carried on an [9] accrual basis and should have reflected the accrued gain or loss at the close of the year. The general financial books and the cost records were not reconciled and tied together in such a manner that the general financial books would show the cost and sales price of work done to the end of a year, and said books could not and did not, therefore, reflect the true income of the taxpayer, which income was produced wholly by operations in the construction of the works stated. The financial books were the outgrowth of operations prior to the establishment by Bent Brothers of correct cost of work executed. The method of keeping the financial books was left wholly in the hands of the bookkeeper who did not appreciate the necessity of conforming the books to the cost records and of making income tax returns in accordance with the correct method of determining the net income of the taxpayer. The books, therefore, did not reflect the true income of the taxpayer and the returns of net income of the partnership made from said books did not reflect the true distributive share of the net

taxable income of each partner derived from the operations of said partnership.

(k) When the members of the partnership, Bent Brothers, of which this taxpayer was one, discovered that the method of keeping the accounts did not reflect each year the true net income of the partnership, action was taken to change the method of the financial books to conform to the facts as shown by the cost records and to have the returns of net income filed by the partnership corrected on a true basis. Subsequent to the filing of amended returns by the partnership and the members of the partnership, an examination of the financial books of the partnership was made by a revenue agent who confined his investigation solely to the financial books and did not examine into the costs and contracts, [10] and could not, therefore, render a true and correct report on the income of the taxpayer to the Commissioner. Amended returns were made for the years 1919 to 1922, inclusive, and a correct segregation of the cost and income was set out in said returns. The revenue agent recognized, and the Commissioner has recognized, the erroneousness of the books and original returns of the taxpayer in that deductions were shifted from one year to another. This action was erroneous in its conclusions because it did not take into account the application of the cost records in determining the income for each year.

5. The several Income Tax Acts contemplate the payment and collection of taxes upon the true income of the taxpayer. If the taxpayer has erroneously stated his income and has done so over a

number of years, either under or over, it is as much the duty of the Commissioner to adjust said income to a true and correct basis as it would be to make such an adjustment either for or against a taxpayer if the income were erroneously stated for only one year. Office Decision 933 referred to in Exhibit "A" is erroneous and ineffective in that it precludes the proper determination of the tax liability of a taxpayer as contemplated by the law.

All the more necessary is a correct determination of the tax liability of this taxpayer, in accordance with the facts, due to the denial to the individual of the right of special assessment based on abnormalities. To incorrectly determine the tax liability of this taxpayer by rejecting the facts disclosed by the cost records of the partnership, creates in itself an abnormal condition, because it "taxes in one year income which had accrued in other years" and compels the taxpayer to pay taxes on such abnormal income when, as a matter of fact, by following the records of the partnership and determining the [11] profit of the partnership for each year based on the number of units handled and the cost and sales price thereof, the income is placed in the year in which it accrued, and can be taxed accordingly.

6. Taxpayer, therefore, prays that his income taxes for years 1920 and 1922 be re-determined in accordance with the law and the facts which he believes to be upon the following basis:

(a) That the items of interest and taxes in computing the net loss of the taxpayer for the year 1919, deductible in the year 1920, be reinstated as

a part of said net loss and thus be used in reducing the taxable income of this taxpayer for the year 1920.

(b) That the distributive share of the net income of this taxpayer from the partnership, Bent Brothers, for each of the years 1919 to 1922, inclusive, be determined by using the unit costs and unit sales value applicable to the number of units of each class moved or placed by said partnership during each respective year.

W. H. TEASLEY,
C. P. A.
Counsel for Taxpayer,
262 Chamber of Commerce Bldg.,
Los Angeles, Calif.

[12] State of California,
County of Los Angeles,—ss.

Wilbur Atkinson, being duly sworn, deposes and says that he holds power of attorney from H. Stanley Bent, the taxpayer named in the foregoing petition, and is duly authorized thereby to execute this verification; that said power of attorney is attached hereto; that he has read the foregoing petition on behalf of said taxpayer and knows the contents thereof and that the same is true of his own knowledge, except as to such matters as are stated on information and belief and as to these matters he believes it to be true.

WILBUR ATKINSON.

Subscribed and sworn to before me this 7 day of July, 1926.

[Seal] THERESA COURBIN,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires April 14, 1929.

[13] KNOW ALL MEN BY THESE PRESENTS, That I, H. STANLEY BENT, of the City of Los Angeles, County of Los Angeles, State of California, have made, constituted and appointed, and by these presents do make, constitute and appoint WILBUR ATKINSON, my true and lawful attorney for me and in my name, place and stead, and for my use and benefit to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interest, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by attachment, arrest, distress or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for me and in my name to make, seal and deliver, to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seizing and possession of all lands, and all deeds, and other assurances in the law thereof, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements and hereditaments upon such terms and conditions, and under such covenants as

he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner, deal in and with goods, wares and merchandise, choses in action and other property in possession or in action, and to make, do, and transact all and every kind of business of what nature or kind soever, and also for me and in my name, and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

GIVING AND GRANTING, unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully to all intents and promises as I might or could do if personally present hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 9th day of February one thousand nine hundred and twenty-five.

H. STANLEY BENT. (Seal)

State of California,
County of Los Angeles,—ss.

On this 9th day of February, in the year nineteen hundred and 25, A. D., before me, Emolyn D. Cavender, a Notary Public in and for the said County of ————————, residing therein, duly commissioned and sworn, personally appeared H. Stanley Bent known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County the day and year in this certificate first above written.

EMOLYN D. CAVENDER,
Notary Public in and for the County of Los Angeles, State of California.

[14] EXHIBIT "A."

APPEAL OF H. STANLEY BENT.

DOCKET No. ——.

[15] TREASURY DEPARTMENT,
Washington.

May 13, 1926.

Office of:
Commissioner of Internal Revenue.
IT:PA:PYA:60D
ARM.

Mr. H. Stanley Bent,
418 South Pecan Street,
Los Angeles, California.

Sir: The determination of your income tax lia-

bility for the years 1919, 1920, and 1922, as set forth in office letter dated September 24, 1925, disclosed a deficiency in tax amounting to $12.73 for the year 1920 and overassessments aggregating $795.97 for the years 1919, 1921 and 1922, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA:60D:ARM. In the event

that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Enclosures:
Statement.
Waiver—Form A.

[16] STATEMENT.

IT:PA:PYA:60D.
ARM.

In re: Mr. H. Stanley Bent,
418 South Pecan Street,
Los Angeles, California.

Years.	Deficiency in Tax.	Overassessment.
1919		$ 16.36
1920 (waiver)	$12.73	
1921		108.59
1922		671.02
Totals	12.73	$795.97

The adjustments recommended in the Revenue Agent's report dated April 22, 1925, a copy of which was furnished you, have been approved by this office.

Careful consideration has been given your protest dated September 28, 1925, against the method used in determining the net taxable income of the partnership of Bent Brothers, Los Angeles, Cali-

fornia, of which you are a member, and also the information submitted by your representative at a conference held in this office November 30, 1925.

This office holds that inasmuch as the books of the partnership were kept on the completed contract basis and this method was elected as the basis of filing returns, you are now prohibited from filing amended returns and reporting the partnership income as determined on another basis.

Office Decision 933 provides that "A taxpayer, having once made his election under Article 36 of Regulations 45, to prepare his return so that the gross income will be arrived at on the basis of completed work, will not later be permitted to file amended returns for the purpose of reporting income computed upon the basis of the expenses incurred on such contract each year during the performance of the contract."

The appeal referred to on page 1 refers only to the deficiency in tax, as the Revenue Act of 1926 does not provide for appeals on an overassessment.

1919.

Inasmuch as the basis used in filing the returns for subsequent years is held to be correct, the original return for 1919 has been accepted. Since an assessment of $16.36 was made on the amended return, there is an overassessment of $16.36.

[17] Mr. H. Stanley Bent. Statement

The overassessments shown herein will be made the subject of certificates of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district.

If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessments do not indicate the amount which will be credited or refunded since a portion may be an assessment which has been entered but not paid.

Payment of the deficiency in tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[18] EXHIBIT "B."

APPEAL OF H. STANLEY BENT.

DOCKET No. ——.

[19] TREASURY DEPARTMENT,
Internal Revenue Service.
Office of:
Supervising Internal Revenue Agent
Sub Treasury Building
San Francisco, Calif.

In re: H. Stanley Bent,
418 So. Pecan St.
Los Angeles, Calif.
Date of report: June 10, 1925.
Years examined: 1920, 1921, 1922.

There is transmitted herewith copy of a report covering examination recently made by a representative of this office covering your income tax

liability, and a form of agreement which, if the adjustments suggested are satisfactory to you, you may sign and return to this office. The agreement, however, until approved by the Commissioner, upon a review of the examining officer's report in Washington, is not binding. In the event that the report is not approved upon review in Washington and there are material changes, you will be given the benefit of due notice and afforded an opportunity to discuss the changes with this office.

If you do not agree with the conclusions stated in the report, it is desired that every opportunity be afforded you to present any objections or additional information which you believe might affect the result of the final decision of the Commissioner of Internal Revenue at Washington, D. C. The original of this report will, therefore, be held in this office for a period not to exceed thirty days from the date of this letter in order that you may, if you so desire, present any protests, briefs, or letters containing additional information. Such protests, briefs, or letters should be forwarded in triplicate to this office, where they will receive careful consideration before the report with all papers pertaining thereto is transmitted to the Department at Washington for final action. If you agree to the findings of the examining officer, the report will be forwarded at once. In the event that you do not submit protest or brief within the thirty day period, the report will immediately thereafter be forwarded to the Bureau. However, any appeal, protest, or additional information affecting the inclosed report should be directed to this office

and not to the Bureau at Washington. If forwarded to the Bureau direct, it will be referred to this office for appropriate consideration.

If protest is submitted, it should be a sworn statement of facts over the signature of the taxpayer and should include all items to which exception is taken.

Please acknowledge receipt by return mail.

Respectfully,

F. H. GOUDY,

Supervising Internal Revenue Agent.

ABY.

[20] In re H. Stanley Bent,
418 Pecan Street,
Los Angeles, Calif.

SUMMARY.

Year.	Defic. in Tax.	Overassessment.
1920	12.73	
1921		108.59
1922		671.02
Net result		766.88

[21] H. Stanley Bent.
Schedule 1.
Block Adjustments.

Year 1920.

Block	Return	Additions	Reductions	Corrected	
A	668.17			668.17	Farming
B	4,800.00			4,800.00	Salary
C	11.486.04		237.11	11,248.93	Partn.
D					Sale
E	850.00			850.00	Rent
G					Int.
H					Div.
I	47.50			47.50	V Note
J	17,851.71			17,614.60	Total
K	5,485.95	335.00		5,150.95	Int. & Taxes
L	12,365.76			2,463.65	
M	84.50			84.50	Contr.
Total	12,281.26	335.00	237.11	12,379.15	

[22] H. Stanley Bent.
Schedule 1a.

Form 1040. Year 1920.

Explanation of Items.

Schedule A	Farming Sales	$ 1,913.38
	Labor & Supplies	1,245.21
	Income	668.17
B	Salary from Bent. Bros.	4,800.00
C	Bent Bros. Partnership	
	Reported	11,486.04
	Amended	11,248.93
	As shown by report on partnership	237.11

D	No income		
E	Rents—Lots		850.00
F	No income		
G	No interest		
H	No dividends		
I	Taxable interest on Victory Notes		47.50
K	Interest paid		2,249.52
	Taxes		469.82
	1919 Business Loss	2,766.61	
	1919 Business loss Amended	2,431.61	2,431.61
	Difference	335.00	5,150.95

(See following page)

M	Contributions		84.50
	Cong. Church	$69.50	
	Y. W. C. A.	15.00	

[23] H. Stanley Bent.

Schedule 1a Continued.

Business Loss 1919.

Business operated at a loss in 1918.

1919 Loss for 1919 deducted from 1920 Income made up as follows:

		1919.
A.	Farming. Sales	$2,334.54
	Wages and fertilizer	1,155.27
	Income	1,179.27
B.	Salary	4,800.00
C.	Partnership Loss—Bent Bros. R.	7,333.33
E.	Rent	$ 297.50
	Less expenses	19.80 277.70

H.	Total	R.	1,076.36
I.	Interest on farm	1,034.50	
	Taxes on farm	320.75	
	Interest on home	175.00	
	Contributions	85.00	1,690.25
	Taxes on home	75.00	
	Taxable income	R.	2,766.61
	Loss deducted in 1920 return		2,766.61
	Deduct		
	Int. on home	175.00	
	Taxes on home	75.00	
	Contributions	85.00	335.00
Loss as amended			2,431.61

[24] H. Stanley Bent.

Schedule 2.

Computation of Tax.

		Year 1920.
Total net income Schedule 1		$12.379.15
Less exemption 2	$2,400.00	
Int. on U. S. obligations	47.50	2,447.50
Income subject to normal tax		9,931.65
Tax 4% on $4,000.00	160.00	
Tax 8% on 5,931.65	474.53	634.53
Surtax $12,379.15		208.96
Total tax assessable		843.49
Tax previously assessed		830.76
Additional tax to be assessed		12.73

[25] H. Stanley Bent.

Schedule 3.

Year 1921.

Block Adjustments.

Line	Return	Additions	Reductions	Corrected	
1	$4,800.00			$4,800.00	Salary.
2					Int.
3	6,336.76		$1,006.64	5,330.12	Partn.
4	500.00			500.00	Rent.
5					
6	300.00			300.00	Sale.
9		$71.25		71.25	Int. V. Notes.
10	(439.62)			R 439.62	Orchard Loss.
11	11,497.14			10,561.75	
12	879.87			879.87	Int.
13	544.78			544.78	Taxes.
15	113.00			113.00	Contr.
17	1,537.65			1,537.65	
Total....	9,959.49	71.25	1,006.64	9,024.10	

[26] H. Stanley Bent.

Schedule 3–1.

Form 1040. Year 1921.

Explanation of Items.

Line 1.	Salary from Bent Bros.		$4,800.00
2.	No. int. received.		
3.	Bent Bros. partnership—Income		
	reported		6,336.76
	amended		5,330.12
	As shown by partnership report of Bent Bros. Difference		1,006.64
4.	Rent of residence		500.00
6.	Sale of lot for	$1,100.00	
	Cost in 1913	800.00	300.00
10.	Loss on Orange Grove		439.62
	Sales	1,455.29	
	Wages & Supplies ...	1,894.91	
12.	Interest paid		879.87
13.	Taxes paid		544.78
15.	Contributions		113.00
	Cong. Church L. A.		

[27] H. Stanley Bent.

Schedule 4.

Computation of Tax.

			Year 1921.
Total net income Schedule 3 ...			$9,024.10
Less exemption		$2,800.00	
Interest on U. S. obligations.		71.25	2,871.25
Income subject to normal tax ..			6,152.85

Tax 4% on $4,000.00	160.00	
Tax 8% on 2,152.85	172.23	
		332.23
Surtax husband's income $9,024.10.....		80.72
Total tax assessable		412.95
Tax previously assessed		521.54
Overassessment		108.59

[28] H. Stanley Bent.

Schedule 5.

Year 1922.

Block Adjustments.

Line	Return	Additions	Reductions	Corrected	
1	$4,800.00			$4,800.00	Salary.
2	116.91			116.91	Business.
3					Int.
4	158,617.12	$1,287.84		159,904.96	Partn.
6	771.82			771.82	Profit.
8		71.25		71.25	Int. V. Notes.
10	164,305.85			165,664.94	
12	1,223.95			1,223.95	Int.
13	491.60			491.60	Taxes.
15	131.00			131.00	Contr.
17	1,846.55			1,846.55	Total.
Total.	162,459.30	1,359.09		163,818.39	

[29] H. Stanley Bent.

Schedule 5a.

Form 1040. Year 1922.

Explanation of Items.

1	Salary from Bent Bros.	$4,800.00
2	Income from farming	
	Sales	2,012.24
	Labor & Supplies	1,895.33
	Income as reported	116.91
3	Bent Bros. partnership—Reported	158,617.12
	Amended	159,904.96
	Difference as shown by report on partnership	1,287.84
6	Sale of Res. Lot	
	Acquired in 1921 Cost	2,592.11
	Income	820.29
		771.82
8	Interest on Vict. notes	71.25
	Included in total income of partnership	
12	Interest paid	1,223.95
13	Taxes on residence and lots	491.60
15	Contribution	131.00
	Cong. Church 106.00	
	Y. W. C. A. 25.00	

[30] H. S. Bent.
Schedule 6.
Computation of Tax.

		Year 1922.
Total net income Schedule 5 .		$163,818.39
Less exemption	$2,800.00	
Int. on U. S. obligations, etc.	71.25	2,871.25
Income subject to normal tax		160,947.14
Tax 4% on $ 4,000.00	160.00	
Tax 8% on 156,947.14	12,555.77	
		12,715.77
Surtax husband's income $163,818.39....		53,231.01
Total tax assessable		65,946.78
Tax previously assessed		66,617.80
Overassessment		671.02

[31] EXHIBIT "C."

APPEAL OF H. STANLEY BENT.

DOCKET No. ——.

[32] Treasury Department.
Internal Revenue Service.
Office of
Sub Treasury Building,
San Francisco, Calif.

In re: Bent Bros.
418 S. Pecan St.,
Los Angeles, Calif.

Date of Report: June 10, 1925.
Years Examined: 1920, 1921, 1922.

There is transmitted herewith copy of a report

covering examination recently made by a representative of this office showing the correct distributive interest of net income to the individual members of the partnership, and a form of agreement which, if the adjustments suggested are satisfactory to you, you may sign and return to this office. The agreement, however, until approved by the Commissioner, upon a review of the examining officer's report in Washington, is not binding. In the event *of* the report is not approved upon review in Washington and there are material changes, you will be given the benefit of due notice and afforded an opportunity to discuss the changes with this office.

If you do not agree with the conclusions stated in the report, it is desired that every opportunity be afforded you to present any objections or additional information which you believe might affect the result of the final decision of the Commissioner of Internal Revenue at Washington, D. C. The original of this report will, therefore, be held in this office for a period not to exceed thirty days from the date of this letter in order that you may, if you so desire, present any protests, briefs, or letters containing additional information. Such protests, briefs, or letters should be forwarded in triplicate to this office, where they will receive careful consideration before the report with all papers pertaining thereto is transmitted to the Department at Washington for final action. If you agree to the findings of the examining officer, the report will be forwarded at once. In the event that you do not submit protest or *beif* within the thirty day per-

iod, the report will immediately thereafter be forwarded to the Bureau. However, any appeal, protest, or additional information affecting the enclosed report should be directed to this office, and not to the Bureau at Washington. If forwarded to the Bureau direct, it will be referred to this office for appropriate consideration.

If protest is submitted, it should be a sworn statement of facts over the signature of the partnership, by one of its members, and should include all items to which exception is taken.

Please acknowledge receipt by return mail.

Respectfully,

F. H. GOUDY,

Supervising Internal Revenue Agent.

[33] In re: Bent Bros.,
418 S. Pecan Street,
Los Angeles, Calif.

SUMMARY.

Year		
1920	Distributive interest shown	
1921	" " "	
1922	" " "	

[34] Bent Bros.—Partnership

Reference is made to taxpayer's Claim for Refund and Abatement in the sum of

	28 338 96
and	29 589 13
	57 928 09

Claim based on statement that the income of the partnership, on long time contracts was, not truly, reflected by the books.

Books show that profit is carried to Profit and Loss account on completed work, therefore, it seems the method used by taxpayers in making original returns was correct.

Reference is made to O D 933–4 CB which reads in part as follows:

"A taxpayer, having once made his election under Art. 36 of Reg. 45 to prepare his return so that the gross income will be arrived at on the basis of completed work, will not later be permitted to file amended returns for the purpose of reporting income completed upon the basis of the expenses incurred on such contract each year during the performance of the contract."

[35] Bent Bros.

Schedule 1.

Year 1920.

Net Income.

Net Income as disclosed by books		35 119 20
As corrected		33 889 30
Net additions		1 229 90
Additions		None
Deductions		
Expense understated	1 102 40	
Int. on Lib. Bonds	127 50	
On 3000 00 4th Loan charged to Personal Acct. in error (See Sch. 5)		
Total Deductions		1 229 90

[36] Bent Bros.

Schedule 1a.

Explanation of Items.		Year 1920.
Sales—Completed contracts		524 342 92
Deduct—		
Labor and material	442 592 90	
General overhead	22 846 55	
Including salaries of partners and managers and office expenses		465 439 45
Profit on completed contracts		58 903 47
Add—		
Interest Lib. bonds	270 00	
Equipment rental	2 449 86	
Miscl. other	4 508 34	7 228 20
Total		66 131 67
Deduct—		
Interest	6 692 55	
La Habra expense	134 58	
Seal joint expense	213 00	
Bad accounts	23 739 20	
Taxes	233 14	
Other expense	1 102 40	32 114 87
Net Income		34 016 80
Less int. on 3000 4th Lib. bonds		127 50
Net income as amended		33 889 30

Bad debts—	
1—Marion Munic Water Co.	2 041 41
2—Jas. Kennedy—Bankrupt	16 087 56
3—Tejunga Water Co—Notes	3 699 70
4—Kimball Note	400 00
5—Tuson subway	1 150 00
6—Misc. B/A	360 53
	23 739 20

Continued.

[37] Bent Bros.

Explanation of Bad Debts.

1—Marion Munic Water Co. 2 041 41

Contract completed in 1919. On account of repairs that had to be made in 1920 the above amount could not be collected.

2—Jas. Kennedy—Loss 16 087 56

Work done for Kennedy in 1917–18 Signal Hill Drain—Kennedy bankrupt, and no part of above since collected. Kennedy paid for some of the work in notes which were discounted at bank and taxpayers had to pay them in 1922. (Sch. 5a)

3—Tejunga Water Company 3 699 70

Bankrupt. Taxpayer's loss was estimated at above amount. Balance due but not collected 9400.30

4—Kimball note total 800.00. Balance		400 00
Nothing paid since 1918 and it is found to be worthless and no possible chance to collect.		
5—Tuson Subway Loss	1	150 00
Additional work that had to be done on completed contract that more than offset the above amount, which was paid by City of Tuson.		
6—San Luis Obispo		255 16
Refused to pay on account of misunderstanding in total due taxpayer other small account		105 37

Much of this might be considered adjustments of contracts closed in prior periods.

Miscellaneous income of 4 508 34 is an offset.

[38] Bent Bros.
Schedule 2.

Year 1920.

Distribution of Income.

		Int. 4¾ Victory	Other
Arthur S. Bent	⅔	95 00	22 497 87
H. Stanley Bent	⅓	47 50	11 248 93
Total		142 50	33 746 80

[39] Bent Bros.

Schedule 3.

Year 1921.

Net Income.

Net income as disclosed by books		12 673 52
As corrected		10 802 75
Net deductions		1 870 77
Additions—		
a Int. on Victory Notes	142 50	
Not collected.		
Total additions		142 50
Deductions—		
Expense	2 013 27	
Understated—Charged to Accounts Receivable in error (See Sch. 5).		
Total deductions		2 013 27
Net deductions as above		1 870 77

[40] Bent Bros.

Schedule 3a.

Explanation of Items.

Year 1921.

Contract Profit and Loss.		Costs.	Sale.
Huntington Park. Res.	1920	16 536 05	
	1921	3 715 80	21 442 66
Hemet Contract	1920	2 286 31	
	1921	17 451 92	21 076 51

Rodeo Drain	1920	9 302 20	
	1921	13 343 94	28 915 55
Total Sales			71 434 72
Total costs			62 636 22
Income on above			8 798 50
Other completed contracts—			
Bent and Pennybaker			1 404 00
Bryant No. 20			1 999 80
Hale Trench			2 725 64
Los Alamitos 20 & 30			1 092 55
Naval Training			986 72
Riverside Tunnel			570 80
Rodeo Ditch			967 38
Lispie Jobs			1 306 00
Wilshire Drain			1 766 94
Misc. other credits			6 112 66
Total			27 730 99
Misc. contract losses			3 883 15
Contract income			23 847 84
Income from equipment			62 02
Ins. refund			140 52
Total			24 050 38
Deduct—			
Interest Paid		11 376 86	
Expenses		2 013 27	13 390 13
Net Income			10 660 25
Int. on Vic. notes (Accrued)			142 50

[41] Year 1921.

Distribution of Income.

	Int. on Victory Notes.		
Arthur S. Bent ½	71 25	5 330 13	
H. Stanley Bent ½	71 25	5 330 12	
Total	142 50	10 660 25	

Victory Notes, 3000 00 at 4¾%.
Interest not collected until 1922.

[42] Bent Bros.
Schedule 5.

Year 1922.

Net Income.

Net income as disclosed by books		317 234 25	
As corrected		319 952 42	
Net additions		2 718 17	
Additions—			
a General Expenses:			
1920	1 102 40		
1921	2 013 27		
Charged to profit and loss in 1922	3 115 67		
Total additions		3 115 67	
Deductions—			
Lib. bond int. 1921 & 1922	255 00		
Victory note 4¾% of 1921	142 50		
Total deductions		397 50	
Net additions as above		2 718 17	

[43] Bent Bros.
Schedule 5a.
Explanation of Income.

		Year 1922.
Gross profits (Sch. 5 A 1)		345 396 71
Salaries—Partners & Managers	20 443 45	
Gen. Contract & Office Expenses	9 587 07	
Traveling Expenses	1 738 03	
Total	31 768 55	
Loss—		
Total of above charged to contract	31 768 55	
Deduct—		
Interest paid	11 848 07	
Bonuses	9 582 07	
Bad account—		
James Kennedy note loss	2 998 51	
Other B/A	443 22	
Incidental charges	174 92	25 046 79
Balance		320 349 92
Less—		
Int. 2 yrs. on 3000 Lib. bonds	255 50	
Int. 1921 3000 Victory Notes	142 50	397 50
Net taxable income		319 952 42

[44] Bent Bros.

Schedule 5A–1.

Cost of Completed Contracts.

		Cost	Total Cost	Sales
El Segundo #6	1921	55 654 15		
	1922	44 456 97	100 111 12	114 374 99
Newport Beach	1921	52 542 81		
	1922	40 818 78	93 361 59	132 412 28
San Dimas Dam	1920	45 392 97		
	1921	108 076 95		
	1922	49 789 86	203 259 78	359 645 27
Julian Highway	1921	268 865 54		
	1922	44 359 61	313 225 15	284 032 86
Genl. Petroleum 1 & 2	1921	11 221 26		
	1922	157 870 79	169 092 05	224 730 00
Ballona Creek Sewer			2 400 84	3 471 00
Bigham Job			726 32	853 04

	Cost	Total Cost	Sales
Chalmers Trench		790 99	878 57
El Segundo #7		52 732 26	87 194 30
El Segundo #8		81 387 37	115 172 47
El Segundo #9		5 579 44	12 115 79
Gen'l. Pet. Res. #3		85 402 76	115 520 00
Hudson Job		944 06	1 445 00
Martinez Job		2 153 84	2 828 78
de Ward & Colburn		3 146 20	3 786 17
Miscl. Cont. Income		527 72	1 777 68
Total Sales			1460 238 20
Cost of Sales			1114 841 49
Gross Profits			345 396 71

[45] Bent Bros.

Schedule 6.

Year 1922.

Distribution of Income.

Arthur S. Bent ½	71 25	159 904 96
H. Stanley Bent ½	71 25	159 904 96
Int. on Vic. Notes	142 50	
Other income		319 809 92

[46] Bent Bros.

EXHIBIT "A."

Balance Sheet. Year 1920.

Assets.	1920.	Dr.	Cr.	Amended.
Cash	3 920 46			
Notes Rec.	17 350 88			
Accts. Rec.	31 608 31		1 102 40	
Uncompleted contracts	63 474 55			
Contract Equip.	52 539 95			
Office Equip.	1 173 48			
Bonds	6 000 00			
Total	176 067 63		1 102 40	174 965 23
Notes pay.	137 693 39			137 693 39
Accts. pay.	4 025 37			4 025 37
Capital	34 348 87	1 102 40		33 246 47
Total	176 067 63			174 965 23

1—Change—Accts. Rec. debited in error in the sum of 1 102 40
See Schedule 1.

[47] Bent Bros.

EXHIBIT "B."

Balance Sheet. Year 1921.

Assets.	Books.	Dr.	Cr.	Amended.
Cash	17 800 18			17 800 18
Notes Rec.	9 400 30			9 400 30
Accts. Rec.	32 647 72		1–1102 40	
			2 2013 27	29 532 05
Work in Progress	102 226 97			102 226 97
Contract Equip.	48 446 31			48 446 31
Office Equip.	1 173 48			1 173 48
Real Estate	11 978 63			11 978 63
Bonds	6 000 00			6 000 00
Int. Accrued		3–142 50		142 50
	229 673 59	142 50	3115 67	226 700 42

Assets.	Books.	Dr.	Cr.	Amended.
Notes pay.	195 843 94			194 843 94
Accts. pay.	3 329 74			3 329 74
Net Capital	30 499 91	3 115 67	142 50	27 526 74
	226 673 59	3 115 67	142 50	226 700 42

1 & 2—Changes (Sch. 1 & 3)
Accts. Rec. 1920
Accts. Rec. 1921
Debited in error 3 115 67
3—Accrued int. on V Notes 142 50
*Cu*pons not cashed.

[48] Bent Bros.

EXHIBIT "C."

Balance Sheet.

Dec. 31, 1922.

	Books	Additions	Reductions	Amended
Cash	17 358 43			
Notes receivable	9 559 10			
Accts. Rec.	34 609 97			
Work in Progress	1 150 758 72	(Per Ex. C–1)		
Equipment	60 817 29			
Real Estate	1 325 04			
Real Estate	13 762 99			
	1 288 191 54			1 288 191 54
Notes Payable	154 074 56			154 074 56
Accts. Payable	168 985 87			168 985 87
Cr. Work in Progress	637 736 55			637 736 55
Capital	327 394 56			327 394 56
	1 288 191 54			1 288 191 54

[49] Bent Bros.

EXHIBIT "C–1."

Analysis of Work in Progress.

Date.	Item.			Total.
	Little Rock Dam 1922	118 160 79		
		20 123 39	138 284 18	
	Bullards Bar Dam 1922	152 025 25		
		2 630 23	154 655 48	
	Henshaw Dam 1922	768 210 45		
		23 071 15	791 281 60	
	Gen'l. Petroleum 4 1922	66 537 46	66 537 46	
	Total		1 150 758 72	

[50] Bent Bros.

EXHIBIT "D."

Analysis of Capital.

Date.	Item.	Books.		Amended.
1/1/20	Balance	R 17 270 33		R 17 270 33
	Add			
	Income per books	35 119 20		
	and amended		33 889 30	
	Non tax Int. Lib. bds.		127 50	
	Cash paid in	15 000 00	15 000 00	
	Salaries not drawn	1 500 00	1 500 00	50 516 80
1/1/21	Balance	34 348 87		33 246 47
	Add			
	Profit Books and amended	12 673 52		10 802 75
		47 022 39		44 049 22

Date.	Item.	Books.		Amended.
	Deduct—Drawings in excess of Salaries	16 522 48		16 522 48
1/1/22	Balance	30 499 91		27 526 74
	Income books & amended	317 234 25	319 952 42	
	Non tax int. Lib. bds.		255 00	320 207 42
		347 734 16		347 734 16
	Drawings	20 339 60		20 339 69
12/31/22	Net Capital	327 394 56		327 394 56

[51] EXHIBIT "D."

APPEAL OF H. STANLEY BENT.

DOCKET No. ——.

[52] CONTRACT FOR THE CONSTRUCTION OF SAN DIMAS DAM.

THIS AGREEMENT, made and entered into this 20th day of September, 1920, by and between LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, organized and existing under the Los Angeles County Flood Control Act of California, approved June 12, 1915, acting through its Board of Supervisors by virtue of the power vested in it by said Act, hereinafter designated as the District, party of the first part, and ARTHUR S. BENT and H. STANLEY BENT, doing business under the name and style of BENT BROTHERS, of the City of Los Angeles, County of Los Angeles, State of California, hereinafter designated as the Contractors, parties of the second part,

WITNESSETH:

That the parties to these presents each in consideration of the undertakings, promises and agreements on the part of the other herein contained, have undertaken, promised and agreed, and do hereby undertake, promise and agree, the party of the first part for itself, its successors and assigns, and the parties of the second part for their heirs, executors, administrators and assigns, as follows:

Article 1. In consideration of the payments to be made as hereinafter provided, and of the perform-

ance by the party of the first part of all of the matters and things by it to be performed as herein provided, the Contractors, parties of the second part, agree, at their own sole cost and expense, to perform all the labor and services, and furnish all the material, plant and equipment (except as herein otherwise provided) necessary to complete, and in good, substantial, workmanlike and approved manner within the time herein specified, and in accordance with the terms, conditions and provisions of this contract, and of the instructions, orders and directions of the Engineer, made in accordance with this contract, the following work, to-wit: the improvements under specifications for San Dimas Dam, in accordance with the specifications on file in the office of the Board of Supervisors of the Los Angeles County Flood Control District.

Article 2. The contractors further agree to begin work within 30 days from the date of execution hereof, and to prosecute the same with speed and diligence and to complete said work on or before the 1st day of January 1923.

Article 3. Time shall be the essence of this contract. If the Contractors fail to complete the work embraced herein, within the time fixed for such completion, they shall become liable to the District for liquidated damages in the sum of *Twent*-five Dollars ($25.00) for each and every day during which said work shall remain uncompleted beyond such time for completion or lawful extension thereof, and the amount of the liquidated damages may be deducted by the Board of Supervisors of the District from

moneys due the Contractors hereunder, at the time of completion, and such Contractors and their sureties shall be liable for any excess, provided the Contractors shall not be held responsible for delays caused by strikes, riots or acts of God.

Article 4. The Los Angeles County Flood Control District, party of the first part, agrees to pay, and the Contractors, parties of the second part, agree to accept as full compensation, satisfaction and [53] discharge, for all work done and all materials furnished, whether mentioned in the following schedule or not, and for all costs and expenses incurred and damages sustained, and for each and every matter, thing or act performed, furnished or suffered, in the full and complete performance and completion of the work of this contract in accordance with the terms, conditions, and provisions thereof and of the instructions, orders and directions of the Chief Engineer thereunder, except extra work which shall be paid for as provided in the Section of the General Specifications entitled "Extra work," and except as in this contract otherwise specifically provided, a sum equal to the amount of the actual work done and materials furnished, as determined by the Chief Engineer, under each item in the following schedule multiplied by the unit price applicable to each such item, as set forth in the following schedule, to-wit:

SCHEDULE OF UNIT PRICES AND ESTIMATED QUANTITIES.

Item 1.	For 20,000 cubic yards, more or less, of loose rock excavation, including all clearing and grubbing and all other incidental work, at the unit price per cubic yard of $2.85 ..... Total Amt.	$57,000.00
Item 2.	For 6,000 cubic yards, more or less, of solid rock excavation, including all incidental work, at the unit price per cubic yard of $4.05 .... Total Amt.	24,300.00
Item 3.	For 900 cubic yards, more or less, of all material encountered in excavation of a tunnel for the cut-off wall, including timbering and all incidental work, at the unit price per cubic yard of $6.90 ..... Total Amt.	6,210.00
Item 4.	For 1,000 lineal feet, more or less, of 2½″ drilled grout holes, including all material, labor and other incidental work, the unit price per lineal foot of $6.00..... ..... Total Amt.	6,000.00

Item 5. For 500 sacks, more or less, of cement grouting in place complete, including all material, labor and other incidental work, but not including the cost of cement as specified in paragraph 3 of the Detailed Specifications, at the unit price per sack of $2.00 .....Total Amt. 1,000.00

Item 6. For 43,000 cubic yards, more or less, of plain concrete in place complete, including all forms and other materials, and all incidental work, but not including the cost of cement as specified in Paragraph 3 of the Detailed Specifications, at the unit price per cubic yard of $6.00 .....Total Amt. 258,000.00

[54]

Item 7. For 800 cubic yards more or less, of reinforced concrete in place complete, including all forms and other materials, and all incidental work, but not including the cost of cement or the cost of the reinforcing steel as specified in paragraph 3 of the Detailed Specifications,

	at the unit price per cubic yard of $17.25 ...Total Amt.	$13,800.00
Item 8.	For 2400 board feet of rough No. 1 Douglas Fir lumber for foot bridge over the spillway in place complete, including painting and all other materials and incidental work, at the unit price per foot board measure of 12¢ .....Total Amt.	288.00
Item 9.	For 640 lineal feet, more or less, of 2″ galvanized wrought iron pipe handrailing in place complete, including pipe, mesh fencing, and all other materials and incidental work, at the unit price per lineal foot of $4.00 .....Total Amt.	2,560.00
Item 10.	For a concrete bulkhead in the old water tunnel suitable for the purpose, and in place complete, including all materials and all incidental work, but not including the cost of cement as specified in paragraph 3 of the Detailed Specifications at	200.00
Item 11.	For 160 lineal feet, more or less, of riveted steel discharge pipe 5′ in diameter	

in place complete, including all labor, materials, transportation, erection, installation, caulking and painting, but not including the cost of the pipe as specified in paragraph 3 of the Detailed Specifications, at the unit price per lineal foot of $3.00 ..... Total Amt.	480.00
Probable Total Amount under proposal according to Engineer's estimate of quantities.	369,838.00

Article 5. Los Angeles County Flood Control District, party of the first part, in order to assist the Contractors to prosecute the work advantageously, further agrees to make progress estimates and payments in the manner provided in the section of the General Specifications entitled "Progress Estimates," to-wit: "The Engineer, shall, from time to time, during the active progress of the work, approximately once a month, make a determination of all work done and materials incorporated [55] in the work by the Contractors up to that time, and a progress estimate, in writing, showing the value of such work and materials under and according to the terms of this Contract, and other amounts due the Contractors; all deductions made in accordance with the provisions of the Contract; then, from the balance, a deduction of 25 per cent of such balance, or a larger percentage, if in the opinion of the Engineer the protection of the District so requires; then,

from the remainder, a deduction of the total amount of all previous payments; and finally, the amount due the Contractors under such progress estimate. Such progress estimates shall not be required to be made by strict measurements, but they *made by* made either by measurement or by approximation.

"In case work is nearly suspended or in case only unimportant progress is being made, the Engineer may, at his discretion, make progress estimates at greater intervals than once a month.

"Upon such progress estimates being made and certified in writing to the Board, the District shall, within ten days after the date of the estimate, pay to the Contractors the amount due them under such estimate; provided, however, that the District may at all times reserve and retain from such amount, in addition to the 25 per cent heretofore mentioned, any sum or sums which, by the terms hereof, or of any law of the State of California, it is or may be authorized or required to reserve or retain."

Article 6. Final payment shall be made in the manner provided in the section of the General Specifications entitled "Final Payment," to-wit: "Whenever, in the opinion of the Engineer, the work covered by this contract has been completed, he shall so certify in writing to the Board, and shall submit a final estimate, showing the total amount of work done by the Contractor, and its value under and according to the terms of this contract; any other amounts due the Contractor; all deductions made in accordance with the provisions of the contract; the total of all previous payment, and the

amount due the Contractor under such final estimate. At the expiration of thirty-five days after date of the acceptance of the work by the Board, the District shall pay to the Contractor the amount due him on the final estimate; provided, however, that before he shall be entitled to payment of such amount, the Contractor shall execute and file with the Board, a release, in proper form, of all claims against the District on account of this contract, except for the Contractor's equity in the amounts kept or retained under the terms of this contract; and except for the interest, if any, due on the final estimate, as provided hereinafter; and except any other claims that have theretofore been filed in accordance with the provisions of the contract, which are listed and itemized in detail in a statement attached to and made a part of such release, giving reasons for, nature of, and amount of each claim so listed. All prior estimates upon which payment may have been made, shall be superseded by the final estimate."

Article 7. It is hereby agreed by the parties to this agreement that the following named specifications, advertisements, bonds, maps and proposals are expressly referred to and made a part hereof and shall constitute an integral part of this agreement:

1. Notice inviting bids for improvements under specifications for San Dimas Dam.
2. Detailed specifications for improvements for San Dimas Dam and maps accompanying same on file in the office of the Board of Supervisors of said District.

[56]

3. General specifications for improvements for San Dimas Dam on file in the office of the Board of Supervisors of said District.
4. Surety bond or bonds furnished or to be furnished by Contractors in accordance with the conditions of this contract and said specifications.
5. Proposal and bids for improvements under specifications for San Dimas Dam on file in the office of the Board of Supervisors of said District.

Article 8. It is expressly stipulated and agreed that the minimum compensation for labor upon said work shall be Two Dollars ($2.00) per day.

It is further expressly stipulated and agreed that no Chinese labor shall be employed upon said work, and that eight hours labor shall constitute a day's work, and that no laborer, workman or mechanic in the employ, or under the direction or control of the Contractors, or of any subcontractors, doing or contracting to do the work, or any part of the work, contemplated by this agreement, shall be required or permitted to labor more than eight hours during any one calendar day, except in cases of extraordinary emergency caused by fire, flood or danger to life or property.

And it is further stipulated and agreed that the said Contractors shall forfeit as a penalty to Los Angeles County Flood Control District the sum of Ten Dollars ($10.00) for each laborer, workman or mechanic employed in the execution of this contract by the Contractors or by any subcontractor upon

said work, for each calendar day during which each laborer, workman or mechanic is required or permitted to labor more than eight hours, and the officer of said Los Angeles County Flood Control District authorized to pay said Contractors moneys becoming due to said Contractors under this agreement shall, when making payments of money thus due, withhold and retain therefrom all sums and amounts which shall have been forfeited as above stipulated and in accordance with the provisions of Section 653c of the Penal Code of the State of California.

IN WITNESS WHEREOF the said Los Angeles County Flood Control District, has, by order of its Board of Supervisors, caused these presents to be subscribed by the Chairman of said Board of Supervisors, and the seal of said District to be affixed and attached by the Clerk, and the said Contractors have subscribed their names thereto the day and year first above written.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT.

JONOTHAN S. DODGE,

Chairman of Board of Supervisors of said District.

BENT BROTHERS,
By ARTHUR S. BENT,
By H. STANLEY BENT,
Contractors.

Attest: L. E. LAMPTON,
County Clerk.
By A. M. McPherron,
Deputy.

[57] Jul. 19, 1926.

EXHIBIT "D."

(Concluded.)

APPEAL OF H. STANLEY BENT.

DOCKET No. 18,458.

[58] CONTRACT AND SPECIFICATIONS.

EXHIBIT "A."

ADVERTISEMENT FLOOD CONTROL WORKS.

OFFICE OF THE BOARD OF SUPERVISORS LOS ANGELES COUNTY FLOOD CONTROL DISTRICT.

NOTICE INVITING BIDS FOR CONCRETE DAM CONSTRUCTION.

Notice is hereby given that sealed bids will be received by the Clerk of the Board of Supervisors of the Los Angeles County Flood Control District, State of California, until —— o'clock the ——— day of ————, 1920, for the necessary excavation and the construction of a concrete storage dam and appurtenant structures located in the San Dimas Canyon about four and one-half miles Northeast of the City of San Dimas, Los Angeles County, California; involving approximately the following quantities:

Item 1 20,000 cubic yards, more or less, of loose rock excavation.

Item 2 6,000 cubic yards, more or less, of hard rock excavation.

Item	3	900 cubic yards, more or less, of tunnel excavation, for cut-off wall.
Item	4	1,000 lineal feet, more or less, of 2½" drilled grout holes.
Item	5	500 sacks, more or less, of cement grouting.
Item	6	43,000 cubic yards, more or less, of plain concrete.
Item	7	800 cubic yards, more or less, of reinforced concrete.
Item	8	2,400 board feet, more or less, of rough No. 1 Douglas Fir for Spillway bridge.
Item	9	640 lineal feet, more or less, of galvanized wrought iron pipe hand railing.
Item	10	A concrete bulkhead in old water tunnel.
Item	11	160 lineal feet of rivited steel discharge pipe installed in place.

The District will furnish all cement, reinforcing steel, the sluice gate and its operating machinery, and the discharge pipe, f. o. b. San Dimas, California.

[59] Each bid must be in duplicate and accompanied by a certified or cashier's check payable to the Chairman of the Board of Supervisors of Los Angeles County Flood Control District for an amount equal to at least ten (10) percent of the amount bid, as a guarantee that the bidder, if successful, will enter into a contract satisfactory to the Board of Supervisors and the successful bidder will be required to file good and sufficient bonds for the faithful

performance of the contract and the payment of laborers and materials and men.

Experience: Each bidder must, if requested, present satisfactory evidence that he is regularly engaged in constructing works of the general character and magnitude as he proposes to execute, and that he is fully prepared with the required capital to begin work promptly and to conduct it as required by these specifications.

The right is reserved to reject any and all bids, to accept one part and reject the other and to waive technical defects as the interests of the district may require. On account of the character of the work and the disastrous results that would attend any failure, it has been decided that bids would be considered only from contractors who have had previous experience in the kind of work proposed under these specifications.

Equipment owned by the Flood Control District: The Los Angeles County Flood Control District owns and has in storage in the city of Los Angeles, the complete equipment of two large rock crushing plants, consisting of motors, crushers, hoists, conveyors, cars, wire cable, 30# rails, electric locomotive, belting, shafting, pulleys and gears, which may be rented from the District by the successful bidder at a low and nominal rental. The District also owns and has in storage at the same place, a large amount of old and used lumber and corrugated iron which was formerly used about these crushing plants, and which the successful bidder may pur-

chase from the District at a very low and nominal price.

Further information will be furnished and drawings and specifications may be inspected at the office of the Chief Engineer, Los Angeles County Flood Control District, Los Angeles, California. Proposal blanks and copies of the plans and specifications may be obtained from the Clerk of the Board of Supervisors upon payment of a deposit of five dollars ($5.00) for each set and which deposit will be refunded if the plans and specifications are returned in good condition previous to the time for opening of bids.

L. E. LAMPTON,
Clerk of the Board of Supervisors of the Los Angeles County Flood Control District.
By ————————,
Deputy.
Date of first publication ————, 1920.

[60] EXHIBIT "E."

GENERAL CONDITIONS AND DEFINITIONS.

1. DEFINITIONS. Wherever the words herein defined, or pronouns used in their stead, occur in this Contract and Specifications, they shall have the meanings here given:

The word "District" or the expressions "Party of the First Part" or "First Party" shall mean the Los Angeles County Flood Control District.

The word "Board" shall mean the Board of Supervisors of Los Angeles County Flood Control District, or any agency or officer duly authorized

to act for the District in the execution of the work required by this Contract.

The word "Supervisors" shall mean the individual members of the Board of Supervisors acting in their official capacity.

The word "Engineer" or "Chief Engineer" shall mean the Chief Engineer of Los Angeles County Flood Control District, or his properly authorized agents, engineers, assistants, inspectors and superintendents, acting severally within the scope of the particular duties entrusted to them.

The word "Contractor" or the expressions "Party of the Second Part" or "Second Party" shall mean the person, persons, partnership, or corporation entering into this Contract for the performance of the work required by it, and the legal representatives of said party or the agent appointed to act for said party in the performance of the work.

The words "Surety" or "Sureties" shall mean the bondsman or party or parties who made secure the fulfillment of the contract by bond and whose signatures are attached to said Bond.

The word "Contract" shall mean, collectively, all of the covenants, terms and stipulations contained in the various portions of this contract, to-wit:

Advertisements, proposal, agreement, bond, specifications and contract drawings.

The word "Specifications" shall mean, collectively, all of the terms and stipulations contained in those portions of the Contract known as

the General Conditions, General Specifications and Detail Specifications.

The word "Drawings" shall mean, collectively, all of the drawings attached to the Contract and made part thereof and also such supplementary drawings as the Engineer may issue from time to time in order to elucidate said contract drawings or for showing details which are not shown thereon, or for the purpose of showing changes in the work as authorized in section entitled Extra Work and Changes.

[61] The words Contract Price shall mean either the unit price or unit prices named in the Agreement, or the Total of all payments under the Contract at the unit price or unit prices, as the case may be.

Wherever in this Contract or in the Official Plan the words Directed, Required, Permitted, Ordered, Instructed, Designated, Considered Necessary, Prescribed, or words of like import are used, it shall be understood that the directions, requirements, permission, order, instruction, designation, or prescription, etc., of the Chief Engineer is intended; and similarly, the words Approved, Acceptable, Satisfactory, or words of like import, shall mean approved by, or acceptable or satisfactory to, the Engineer, unless another meaning is plainly intended.

2. SURETIES. With the execution and delivery of this Contract the Contractor shall give security for the faithful performance of the Contract by filing with the Board one or more Surety Bonds

in the form annexed hereto, the aggregate amount of which shall be not less than 25% of the contract price, and also shall give security for the payment of material men and laborers by filing with the Board one or more surety bonds in the form annexed hereto—the aggregate amount of which shall be not less than 50% of the estimated cost of all material and labor to be used under this contract. Each bond must be signed by the Contractor and the Sureties. The Sureties, and the amount in which each will qualify, must be satisfactory to the Board.

Should any Surety upon the Contract be deemed unsatisfactory at any time by the Board, notice will be given the Contractor to that effect and the Contractor shall forthwith substitute a new Surety or Sureties satisfactory to the Board. And no further payment shall be deemed due or shall be made under this Contract, until the new Surety or Sureties shall qualify and be accepted by the Board.

3. TIME AND ORDER OF COMPLETION. The Contractor agrees that the work shall be commenced and carried on at such points and in such order of precedence, and at such times and seasons as may be directed by the Engineer. The Engineer shall have the right to have the work discontinued, for such time as may be necessary, in whole or in part, should the condition of weather, or of flood, or other contingency make it desirable so to do, in order that the work shall be well and properly executed. Extension of time may be granted the Contractor for discontinuance of work

so required, as provided in section entitled Extension of Time.

The Contractor further agrees that he will begin work not later than at the time specified in the Agreement, and will progress therewith at such a rate that the work shall be completed in accordance with the Contract. Determination as to whether this rate of progress is being maintained shall be made by comparing the values at the contract price, of the work done as shown in the progress estimates, with the total estimated contract price. Any failure to maintain the required rate of progress, after taking into consideration extensions of time that have been granted, shall be a breach of contract, just as would be a failure to complete the entire work within the specified time.

[62] The Board shall have the right, at its discretion, to extend the time for the completion of the work beyond the time stated in this Contract, for reasons set forth in Section entitled Extension of Time, but such extension, if so granted, shall wave no other obligations of the Contractor or of the Sureties, and if the time for the completion of the work be extended by the Board, then in such case, the District shall be fully authorized and empowered to make such deductions from the final estimate of the amount due the Contractor, as are stipulated in Article 4 of the Agreement, for each calendar day that the Contractor shall be in default for the completion of the work beyond the date to which time of completion shall have been extended by the Board. Should the Contractor

be permitted to continue and finish the work or any part thereof after the time fixed by the Contract for completion, or as it may have been extended, such permit shall in no wise operate as a waiver on the part of the District, if its right to collect the liquidated damages agreed upon in case of such delay, or of any of its rights under this Contract.

4. EXTENSION OF TIME. Delays due to causes beyond the control of the Contractor other than such as reasonably would be expected to occur in connection with or during the performance of the work, may entitle the Contractor to an extension of time for completing the work sufficient to compensate for such delay. No extension of time shall be granted, however, unless the Contractor shall immediately, but in any case within 15 days from the initiation of the delay, notify the Engineer in writing of such delay, and of the time of beginning and the cause of the same, and unless he shall within 15 days after the expiration of such delay notify the Engineer in writing of the extension of time claimed on account thereof,—and then only to the extent, if any, allowed by the Engineer. No extension of time shall operate to release the Surety from any of its obligations.

The Contractor declares that he has familiarized himself with weather, river, the location of the work and local conditions and other circumstances which may, or are likely to, affect the performance and completion of the work, and that he has carefully examined the data and information pertinent thereto collected by the Engineer and on file in

his office, and agrees that, taking these conditions and circumstances into account, he will provide adequate equipment and prosecute the work in such manner, and with such diligence, that the same will be completed within the time specified herein, or as the same may be extended, even though the most adverse conditions which reasonably could be expected to occur during the period of construction do prevail during the performance of the work. It is understood, however, that as to river and weather conditions and circumstances which reasonably are to be expected to occur as shown by past records.

When the work of the District is enjoined by legal proceedings which prevent the Contractor from prosecuting any of the work of this Contract, an extension of time shall be granted sufficient, in the opinion of the Engineer, to compensate for such delay, but no injunction as to a part of the Contractor's work shall entitle him to an extension of time, unless in the opinion of the Engineer, such injunction unavoidably delays the completion of the whole work.

[63] 5. DISTRICT TO FURNISH RIGHT-OF-WAY. The District will furnish to the Contractor all right-of-way, which in the opinion of the Engineer, is necessary for carrying on the work and for taking or wasting material. In case of serious interference to the work by delay in furnishing such right-of-way, the Contractor shall be allowed an extension of time equivalent to the time lost by unavoidable delay in the completion of the

Contract because of the failure to furnish the right-of-way on time.

In case of serious delay and loss to the Contractor because of failure of the District to furnish right-of-way which in the opinion of the Engineer is necessary for the work, the Contractor shall be compensated for such loss.

6. INSPECTION AND RIGHT OF ACCESS. The Board contemplates, and the Contractor hereby agrees to, a thorough and minute inspection by the Engineer, or by any of his agents or by any of the agents which the Board may appoint for such purpose, of all work and material furnished under this Contract, in order to ascertain whether all workmanship or materials are in strict accordance with the requirements of this Contract.

The Contractor shall furnish to the Board, the Engineer, or any of their agents, access at all times to the work and to the premises used by the Contractor, and shall provide them every reasonable facility for the purpose of inspection.

7. DEFECTIVE WORK. The Contractor shall regard and obey the directions and instructions of any authorized engineer or agent with reference to correcting any defective work or replacing any materials found to be not in accordance with the specifications and drawings; and in cases of dispute the Contractor may appeal to the Chief Engineer, who is hereby appointed to sit as Umpire and whose decision shall be final; but pending such decision the instructions of said engineer or agent shall be followed, and the Contractor shall

make no claim for damages or delay on this account. If the work, or any portion thereof, shall be damaged in any way, or if defects not readily detected by inspection shall develop before the final completion and acceptance of the whole work, the Contractor shall forthwith make good without compensation such damage or defect, in a manner satisfactory to the Engineer. Any materials brought upon the ground for use in the work, which shall be condemned by the Engineer as unsuitable, or not in conformity with the Contract, shall be immediately discarded and removed by the Contractor to a satisfactory distance from the work.

If the Contractor shall fail to replace any defective or damaged work or material after reasonable notice, the Engineer may cause such work or materials to be replaced, and the expense thereof shall be deducted from the amount to be paid to the Contractor.

8. RETAINING IMPERFECT WORK. If the Contractor shall execute any part of the work defectively, and if the imperfection, in the opinion of the Engineer shall not be of such magnitude or importance as to necessitate, or be of such nature as to make impracticable or dangerous or undesirable, the removal and reconstruction of the imperfect part, then the Engineer shall, with the written approval of the Board, have the right to make such deduction as may be just and reasonable, from the amounts due or to become due the Contractor instead of requiring the imperfect part to be removed and reconstructed.

[64] 9. ENGINEER CANNOT WAIVE OBLIGATIONS. It is expressly agreed that neither the Engineer, nor any of his assistants or agents shall have any power to waive the obligations of this Contract for the furnishing by the Contractor of good and suitable material and for his performing good work as herein described. Failure or omission on the part of the Engineer, or any of his assistants or agents, to condemn defective or inferior work or material, shall not imply acceptance of the work, or release of the contractor from obligation to at once tear out, remove and properly replace the same without compensation, and at his own cost and expense, at any time upon the discovery of said defective work and material, prior to the final acceptance of the entire Contract and the release of the Contractor by the Board notwithstanding that such work or such material may have been estimated for payment, or payments may have been made on the same. Neither shall such failure or omission, nor any acceptance by the Engineer or by the Board, be construed as barring the Board, at any subsequent time, from recovery of damages, and of such a sum of money as may be needed to remove and to build anew all portions of the work in which fraud was practiced or improper work or material hidden.

10. TO DIRECT WORK. It is mutually agreed that the Engineer shall have the right to direct the manner in which all work under this Contract is to be conducted, in so far as may be necessary to secure the safe and proper progress and quality of the work.

Upon all questions concerning the execution of the work, and the interpretation of the drawings and specifications, and on the determination of quantities and cost, the decision of the Engineer shall be final and binding on both parties, and his estimates and decisions shall be a condition precedent to the right of the Contractor to receive any money under this contract.

11. TO PROVIDE FOR EMERGENCIES. It is understood by all parties to this Contract that unusual conditions may arise on the work which will require that immediate and unusual provisions be made to protect the public from danger of loss or damage due directly or indirectly to the prosecution of the work, and that it is part of the service required of the Contractor to make such provisions.

The Contractor shall use such foresight and shall take such steps and precautions as may be necessary to protect the public from danger or damage or loss of life or property, which would result from the interruption of public water supply, Irrigating Water or other public service, or from the failure of partly completed work.

Whenever, in the opinion of the Engineer, an emergency exists against which the Contractor has not taken sufficient precaution for the safety of the public or the protection of the works to be constructed under this Contract, or of adjacent structures or property which may be injured by processes of construction on account of such neglect; and whenever, in the opinion of said Engineer, im-

mediate action shall be considered necessary in order to protect public or private, personal or property interests liable to loss or damage on account of the operations under this Contract, then, and in that event, the Engineer, upon giving notice to the Contractor, may provide suitable protection to said interests by causing such work to be done and material to be furnished as, in the opinion of the Engineer, may [65] seem reasonable and necessary.

The cost and expense of said work and material shall be borne by the Contractor and if he shall not pay said cost and expense upon presentation of the bills therefor duly certified by the Engineer, then said cost and expense shall be deducted from any amounts due or which may become due said Contractor. In case the Board shall decide that all or part of the expense incurred in meeting any emergency in such as for any reason cannot be justly charged to the Contractor, it may compensate the Contractor for all or part of the work done and material furnished in meeting such emergency.

12. TO MODIFY METHODS AND EQUIPMENT. Except where otherwise directly specified in the Contract, the Contractor shall design, lay out, and be responsible for the methods and equipment used in fulfilling the Contract; but such methods and equipment when required, shall have the approval of the Engineer. Whenever required, the Contractor shall furnish to the Engineer for his information bills of materials, descriptions and copies of drawings showing in reasonable detail the

materials and construction of any construction plants, false work, structures, parts of any structures, or appliances, to be furnished or built under this Contract, for which complete detail drawings are not to be issued by the Engineer. If at any time the Contractor's methods or equipment appear to the Engineer to be unsafe, inefficient or inadequate for securing the safety of the workmen, the quality of work, or the rate of progress required, he may order the Contractor to increase their safety and efficiency or to improve their character, and the Contractor shall comply with such orders. If at any time the Contractor's working force, in the opinion of the Engineer, shall be inadequate for the securing of the necessary progress, as herein stipulated, the Contractor shall, if so directed, increase the force or equipment to such an extent as to give reasonable assurance of compliance with the schedule of progress; but the failure of the Engineer to make such demand shall not relieve the Contractor of his obligation to secure the quality, the safe conducting of the work, and the rate of progress required by the Contract; and the Contractor alone shall be responsible for the safety, efficiency and adequacy of his plant, appliances and methods.

13. TO FURNISH LINES AND GRADES. All lines and grades will be given by the Engineer, but the Contractor shall provide such materials as are not normally part of an engineering equipment, and give such assistance as reasonably may be required by the Engineer to enable measurements

and inspections to be made. He shall not be required, except for brief intervals, to furnish men or material to do the work which would naturally belong to members of a surveying or inspection party. It is the intention not to delay the work for the giving of lines or grades, but if necessary, working operations shall be suspended for such reasonable time as the Engineer may require for this purpose. No special compensation shall be made for the cost to the Contractor of any of the work or delay occasioned by giving lines and grades, by making other necessary measurements, or by inspection; but such costs, it is agreed, shall be included in the Unit prices stipulated for the appropriate items of construction. The Contractor shall keep the Engineer informed a reasonable time in advance, of the times and places at which he intends to do work, in order that lines and grades may be furnished and necessary measurements for record and payment may be made with the minimum of inconvenience to the Engineer or of delay to the Contractor.

[66] All marks and stakes must be carefully preserved in their proper places by the Contractor, and in case of their destruction by him or any of his employees, such stakes will be replaced by the Engineer at the Contractor's expense.

14. TO DETERMINE QUANTITIES AND MEASUREMENTS. The Engineer shall make all measurements and determine all quantities and amounts of work and materials done or furnished under this contract.

Unless specifically so stated in detail in the Contract or Specifications, no extra measurements, or measurements according to local custom of any kind, shall be allowed in measuring the work under this Contract; but only the length or area, as the case may be, shall be considered.

It is stipulated and agreed that the planimeter shall be considered an instrument of precision adapted to the measurement of all areas.

15. Any drawings or plans that may be connected with these specifications shall be regarded as forming a part of the specifications and of the contract. Anything mentioned in the specifications and not shown in the drawings, or *vice versa,* shall be done as though shown and mentioned in both. Should the drawings and specifications conflict as regards the same detail, the Engineer's decision as to which is correct shall be final and binding.

Additional plans: Wherever additional plans may become necessary in the progress of the work, they will be furnished by the Engineer.

The intent of these specifications is to provide for the proper construction of the work herein referred to, and it is understood that the Contractor agrees to furnish anything and everything necessary for such construction, notwithstanding any omissions or errors in the drawings or specifications.

The Contractor shall carefully check the detail drawings before beginning work or ordering materials, and if any errors be found shall report them

to the Engineer, after which the Contractor shall be responsible for all errors which may occur or which may have occurred. Any doubts that may arise regarding the intent and purpose of the drawings or specifications shall be referred to the Engineer for his decision before bidding as no allowance will be made for misunderstandings after the contract is let.

16. ITEMS OF WORK. The division into Items has been made to enable the Contractor to bid on the different portions of the work in accordance with his estimate of their unit cost, so that in the event of any increase or decrease in the quantities of any particular kind of work, the actual quantities executed may be paid for at the Unit Price for that particular kind of work.

[67] 17. EXTRA WORK AND CHANGES, Extra work is defined as work other than that prescribed in these specifications and not included in the Schedule of Unit Prices herein agreed upon but is an essential part of the improvement contemplated. The right is reserved by the Engineer to make such minor changes in the work to be done, or the manner of doing the same, as may be deemed necessary during the progress of the work; also if any major change or Extra Work is necessary, the Engineer shall, with the consent of the Board, incorporate such major change or Extra Work into the plans and specifications of the work, making a new price on this change, or Extra Work, if necessary, with the consent of the Board.

If such changes diminish the quantity of work to be done, they shall not constitute a claim for

damages or anticipated profits on the work that may be dispensed with; provided, that if the said first party shall make such changes or alterations as shall make useless any work already done or material already furnished or used in said work, the Engineer shall make reasonable allowance therefor, which action shall be binding on both parties. If they increase the amount of work, such increase shall be paid for according to the quantities actually done and at the Unit Price established for such work under this Contract.

18. PAYMENTS. The Engineer will within the first ten days of each month after said work is commenced and until the completion and acceptance thereof, make and deliver to the Contractor duplicate certificates stating the value of the work then completed according to the contract, estimated according to the standard of the unit contract prices, and thereupon the Contractor shall be paid an amount sufficient with all previous payments to make the aggregate 75% of the value of the said work done, as certified.

The said certificates of the Engineer shall not be conclusive, but advisory merely, and the payments herein shall be made only when in the judgment of the Board of Supervisors said work has been performed in accordance with this contract. Payments will not be made for materials at the mills or at the site, but for completed work only.

The partial payments made as the work progresses will be payments on account and shall in no wise be considered as an acceptance of any part

of the work or materials of the contract, nor shall they in any way govern the final estimate.

At the expiration of 35 days after the final acceptance of said work the Contractor shall be paid the balance of the total contract price after deducting any sums which may lawfully be retained under this contract.

The structure will not be finally accepted until the completion of the entire work under this contract. Should the District exercise its rights to stop the work and terminate the contract under the terms of the Agreement pertaining thereto, that portion of the structure then completed will be finally accepted as though it were the entire work.

[68] 19. Delayed Payments. Should any payment due the Contractor on any estimate be delayed through fault of the District, beyond the time stipulated, such delay shall not constitute a branch of contract or be the basis for a claim for damages, but the District shall pay the Contractor interest on such amount at the rate of 6 per cent per annum for the period of such delay. The term for which interest will be paid shall be reckoned, in the case of progress estimates, from the 20th day after date of the estimate, to the date of payment of the estimate; and in case of the final estimate, from the 35th day after the acceptance to the date of payment of the final estimate. The date of payment of any estimate shall be considered the day on which the payment is made or offered as evidenced by the records of the Treasurer's office. If interest shall become due on any progress esti-

mate the amount thereof, as determined by the Board shall be added to a succeeding estimate. If interest shall become due on the final estimate, it shall be paid on a supplementary voucher prepared by the Board; provided, however, that the Contractor shall not be entitled to interest on any sum or sums which by the terms hereof the District may be authorized to reserve or retain.

20. PAYMENT ONLY IN ACCORDANCE WITH CONTRACT. The Contractor shall not demand, nor be entitled to receive, payment for the work or materials, or any portion thereof, except in the manner set forth in this Contract, and after the Engineer shall have given a certificate for such payment.

21. MONEY RETAINED FOR DEFECTS AND DAMAGES. The Contractor shall pay to the District all expenses, losses and damages, as determined by the Engineer, incurred in consequence of any defect, omission, or mistake of the Contractor or of his employees, or the making good thereof, and the District may apply any moneys which otherwise would be payable at any time hereunder to the payment thereof.

22. CLAIMS FOR DAMAGES. It is agreed that if the Contractor shall claim compensation for any alleged damage by reason of the acts or omissions of the Board, or its agents, he shall within 10 days after the sustaining of such damage, make a written statement to the Engineer of the nature of the alleged damage. On or before the last day of the month succeeding that in which any such

damage is claimed to have been sustained, the Contractor shall file with the Engineer an itemized statement of the details and amount of such damage, and upon request of the Engineer shall give him access to all books of account, receipts, vouchers, bills of lading and other books or papers containing any evidence of the amount of such damage. Unless such statement shall be filed as thus required, his claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such damage.

23. REMEDIES CUMULATIVE. Any remedy provided in this Contract shall be taken and construed as cumulative, that is, additional to each and every other remedy herein provided.

24. ACCEPTANCE SHALL NOT CONSTITUTE WAIVER. No order, measurement, determination, or certificate by the Engineer, or order by the Board for payment of money, or payment for, or acceptance of the whole or any part of the work by the Engineer or the Board, or extension of time, or possession taken by the Board or its employees, shall operate [69] as a waiver of any portion of this contract or of any power herein provided, except as provided for in the Section of these Specifications, entitled Retaining Imperfect Work; nor shall any waiver of any breach of this Contract be held to be a waiver of any other or subsequent breach.

25. COLLATERAL WORKS. The Board reserved the right to have such agent or agents as it may elect enter the property or location on which

the works herein contracted for are to be constructed, or installed, for the purpose of constructing or installing such collateral works as said first party may desire, or for the construction or reconstruction of railroads, traction lines, telephone and telegraph lines, highways, irrigation ditches, or other works affected by the improvement. Such collateral works will be construed or installed with as little hindrance or interference as possible with the Contractor. The party of the second part hereby agrees not to interfere with, or prevent the performance of, any collateral work by the agent or agents of the party of the first part.

26. PERSONS INTERESTED IN CONTRACT. The Contractor hereby declares that no person or corporation other than as stated in his proposal dated ————, 19— has any interest hereunder as Contractor.

27. PERSONAL ATTENTION OF CONTRACTOR. The Contractor shall give his personal attention constantly to the faithful prosecution of the work and shall be present, either in person or by a duly authorized representative on the site of the work, continually during its progress.

28. CONTRACTOR'S ADDRESS. The address given in the bid or proposal upon which this Contract is founded is hereby designated as the place to which notices, letters and other communications to the Contractor shall be mailed or delivered. The delivering at the above named place of any notice, letter or other communication from the Board or its agents, to the Contractor shall be

deemed sufficient service thereto; upon the contractor, and the date of said service shall be the date of such delivery. The address may be changed at any time by notice from the Contractor to the Board. Nothing herein contained shall be deemed to preclude or render inoperative the service of any notice, letter or other communication upon the Contractor personally.

29. AGENTS, SUPERINTENDENTS AND FOREMEN. When the Contractor is not present on any part of the work where it may be desired to give directions, order may be given by the Engineer and shall be received and obeyed by the Superintendent or Foreman who may have charge of the particular part of the work in reference to which orders are given.

30. COMPLIANCE WITH LAWS. The Contractor shall keep himself fully informed of all laws, ordinances, and regulations in any manner affecting those engaged or employed in the work, or the materials and appliances used in the work, or in any way affecting the conduct of the work, and of all orders and decrees of bodies or tribunals having jurisdiction or authority over the same. He shall at all times himself observe and comply with, and shall cause his agent and employees to observe and comply with, such existing and future laws, ordinances, regulations, orders and decrees; and shall protect the District against any claim or liability [70] arising from or based upon the violation of any such law, ordinance, regulation, order or decree, whether by himself or his employees.

31. CHARACTER OF WORKMEN. None but skilled foremen and workmen shall be employed on work requiring special qualifications, and when required by the Engineer the contractor shall discharge any person who is, in the opinion of the Engineer, disorderly, dangerous, insubordinate or disrespectful, incompetent or otherwise objectionable, and such discharge shall not be the basis of any claim for compensation or damages against Flood Control District or any of its officers or representatives.

32. TO MAINTAIN COMMUNICATIONS. The contractor shall build and maintain temporary bridges, roads, railroads, telegraph and telephone lines, irrigation ditches and other means of communication where such communication is interfered with on the work of his Contract, and shall provide for convenient access to the various parts of the work and to adjacent private property which may be affected by the work. He shall provide such temporary fences or guards as may be necessary either to keep live stock on adjoining property from entering the lands occupied by the works, or to make roads and other communications safe by night as well as by day.

In case, in the opinion of the Engineer, such Temporary works are dangerous or insufficient, the Contractor shall bring them to the condition of safety or sufficiency required by the Engineer. He shall not disturb, close or obstruct any existing highways or other communications until he has

obtained permits therefor from the proper authorities.

The Contractor shall be responsible for the sufficiency and safety of all such temporary works, and shall be responsible for all damage resulting from their insufficiency, either in construction, maintenance or operation.

33. TO GUARD AGAINST ACCIDENTS. Before any work is done under this contract the Contractor shall file with the Board of Supervisors a certificate from the California State Compensation Insurance Fund, or other acceptable Insurance Company, showing that all persons employed or to be employed under this Contract are insured against accidents in compliance with the Workmen's Compensation Act of the State of California.

The Contractor, at all times throughout the performance of this Contract, shall take all precautions necessary to effectually prevent any accident in any place affected by his operations in consequence of the work being done under this Contract, and shall, to this end, put up and maintain suitable and sufficient barriers, signs, light, or other necessary protection.

[71] The Contractor shall save harmless the District from any suits or claims of every name or description brought against it, for and on account of any injury or damage to person or property, received or sustained by any person or persons, by or from the Contractor or any duly authorized subcontractor or any agent, employee or workman, by or on account of work done under this Contract,

or any extension or addition thereto, whether caused by negligence or not, or by or in consequence of any negligence in guarding the same, or any material used or to be used for the same, or by or on account of any material, implement, appliance or machine used in its construction; or by or on account of any accident or of any act or omission of the Contractor or of any duly authorized sub-contractor or any agent, employee or workman.

The Contractor agrees that such *much* of the money due him under this contract as shall be considered necessary by the Board may be retained until all suits or claims for damages as aforesaid have been settled and evidence to the effect has been furnished to the Board.

34. Contractor Responsible for Claim. The Contractor shall assume the defense of and save harmless the District from all claims of any kind arising from his operations in the performance of the Contract. But he shall not be held responsible for damage which is inevitable or necessary because of the nature of the improvement, and which does not result in any way from his manner of doing the work.

35. HINDRANCES AND DELAYS. The risks and uncertainties in connection with the work are assumed by the Contractor as a part of this Contract, and are compensated for in the Contract price for the work. The Contractor, except as otherwise definitely specified in this Contract, shall bear all loss or damage for hindrances or delays, from any causes, during the progress of any portion

of the work embraced in this contract, and also all loss or damage arising out of the nature of the work to be done, or from the action of the elements, inclement weather and floods, or from any unforeseen and unexpected conditions or circumstances encountered in connection with the work, or from any other cause whatever; and except as otherwise definitely specified in this contract, no charge other than that included in the Contract price for the work shall be made by the Contractor against the District for such loss or damage.

Should the work be stopped by order of the party of the first part for any cause other than those authorized in this Contract, then and in that event, such expense as, in the opinion of the Engineer, is caused to the Contractor thereby, other than the legitimate cost of carrying on this Contract, shall be paid by the party of the first part.

36. DELIVERY OF MATERIALS. Materials to be used for work under this contract shall be delivered sufficiently in advance of their proposed use to prevent delays, and they shall be delivered approximately in order required.

[72] 37. INFRINGEMENT OF PATENTS. The Contractor shall be held responsible for any claims made against the District for any infringement of patents by the use of patented articles, or methods, used by him in the construction and completion of the work, or any patented process connected with the work agreed to be performed under the Contract, or of any patented materials used upon the said work, and shall save harmless the District

from all costs, expenses and damages which the District shall be obliged to pay by reason of any infringement or alleged infringement of patents used in the construction and completion of the work.

38. PROTECTION AGAINST CLAIMS FOR LABOR AND MATERIALS. The Contractor agrees that he will save harmless the District from all claims against it for material furnished or work done under this Contract.

It is further agreed by said Contractor that he shall, if so requested, furnish the Board with satisfactory evidence that all persons who have done work or furnished material under this Contract have been duly paid for such work or material, and in case such evidence is demanded and not furnished as aforesaid, such amount as may in the opinion of said Board be necessary to meet the claim of the persons aforesaid may be retained from the money due said party of the second part under this Contract, until satisfactory evidence be furnished that all liabilities have been fully discharged.

When required by the laws of California, moneys due the Contractor may be retained for protection against claims.

39. ASSIGNMENT. The Contractor shall not assign, transfer, convey, sublet or otherwise dispose of this Contract, or his right, title or interest in or to the same or any part thereof, without the previous consent in writing of the Board. If the contractor shall, without such previous written con-

sent, assign, transfer, convey, sublet, or otherwise dispose of this Contract, or of his right, title, or interest therein, to any other person, company or other corporation, or by bankruptcy, voluntary or involuntary, or by assignment under the insolvency laws of any State; lose or be deprived of the same; this Contract may at the option of the Board be revoked and annulled, and the District shall thereupon be relieved and discharged from any and all liability and obligations growing out of the same to the Contractor, and to his assignee, trustee, or transferee; and no right under this Contract, or to any money to become due hereunder shall be asserted, excepting as provided herein, against the District, in law or equity by reason of any so-called assignment of this Contract, or any part thereof, or of any moneys to become due hereunder unless authorized as aforesaid by the written consent of the Board.

[73] 40. REMOVAL OF EQUIPMENT. The Contractor shall not sell, assign, mortgage, hypothecate or remove equipment or materials which have been installed and which may be necessary for the completion of the Contract without the written consent of the Engineer.

41. TERMINATION OF CONTRACT IF ABANDONED, ASSIGNED, DELAYED OR VIOLATED. If the work *be* done under this contract shall be abandoned by the Contractor, or if this Contract shall be assigned, or placed in bankruptcy, or the work sublet by him otherwise than as herein specified, or if at any time the Engineer shall be of the opinion and shall so certify in writ-

ing to the Board that the performance of the Contract is unnecessarily or unreasonably delayed, or that the Contractor is violating any of the conditions or agreements of this Contract, or is executing the same in bad faith or not in accordance with the terms thereof, or is not making such progress in the execution of the work as to indicate its completion within the time specified in the Contract, or within the time to which the completion of the Contract may have been extended by the Board, the Board may notify the Contractor as hereinbefore provided, and a copy of which notice shall be given to his Surety, or the authorized agent for the latter; thereupon the Contractor shall discontinue the work, or such part thereof as the Board shall designate and thereupon, the Surety may, at its option, assume this Contract, or that portion thereof on which the Board has ordered the Contractor to discontinue work, and proceed to perform the same and may, with the written consent of the Board, sublet the work or portion of the work so taken over; provided, however, that the Surety shall exercise its option, if at all, within two weeks after written notice to discontinue work has been served upon the Contractor and upon the Surety or its authorized agent. The Surety, in such event, shall take the Contractor's place in all respects and shall be paid by the party of the first part for all work performed by it in accordance with the terms of this Contract; and if the Surety under the provisions hereof shall assume said entire Contract, all moneys remaining due the Contractor at the

time of his default shall thereupon become due and payable to the Surety as the work progresses, subject to all of the terms of this Contract.

In case the Surety does not, within the hereinbefore specified time, exercise its right and option to assume this Contract or that portion thereof on which the Board has ordered the Contractor to discontinue work, then the Board shall have the power to complete by contract or otherwise, as it may determine, the work herein described, or such part thereof as it may deem necessary, and the Contractor agrees that the Board shall have the right to take possession of and use any of the materials, plant, tools, equipment, supplies and property of every kind provided by the Contractor for the purpose of his work, and to procure other tools, equipment and materials for the completion of the same, and to charge to the Contractor the expense of said contracts, labor, materials, tools and equipment and expenses incident thereto. The expense so charged shall be deducted by the District out of such moneys as may be due or may at any time thereafter become due the [74] Contractor under and by virtue of this Contract, or any part thereof. The Board shall not be required to obtain the lowest figures for the work of completing the Contract, but the expense to be deducted shall be the actual cost of such work. In case such expense is less than the sum which would have been payable under this Contract if the same had been completed by the Contractor, then the Contractor shall be entitled to receive the difference; and in case such expense

shall exceed the amount which would have been payable under the Contract if the same had been completed by the Contractor, then the Contractor shall pay the amount of such excess to the District on notice from the Board of the excess so due; but such excess shall not exceed the amount due under this Contract, at the time the Contractor is notified to discontinue said work, or any part thereof, plus the amount of the bond or bonds executed by the contractor for the performance of this Contract. When any particular part of the work is being carried on by the Board, by contract or otherwise, under the provisions of this section, the Contractor shall continue the remainder of the work in conformity with the terms of this contract, and in such manner as in nowise to hinder or interfere with the persons or workmen employed, as above provided, by the Board.

[75] EXHIBIT "F."

DETAILED SPECIFICATIONS

for

THE CONSTRUCTION OF SAN DIMAS DAM

and

APPURTENANT STRUCTURES.

[76] 1. LOCATION:

The work proposed under these specifications is located in San Dimas Canyon, about four and one-half miles Northeast of San Dimas, County of Los Angeles, California, and in the Los Angeles County Flood Control District.

2. STAKING OUT:

Before bids are asked upon this contract, the District will mark upon the ground with stakes indicating the location of the proposed dam referred to in these specifications.

3. MATERIAL TO BE FURNISHED BY THE DISTRICT:

The district will furnish all cement, reinforcing steel, the sluice gate and its operating machinery and discharge pipe, f. o. b. San Dimas.

4. WORK TO BE DONE:

Work to be done under these specifications contemplates the construction of a concrete storage dam having its crest approximately 140 feet above the bed of San Dimas Canyon and being about 400 feet long on top, having a spillway at one end and a 60″ discharge gate and pipe near the bottom.

5. APPROXIMATE QUANTITIES:

The estimated quantities for the entire contract are as follows:

Item 1 20,000 cubic yards, more or less, of loose rock excavation.

Item 2 6,000 cubic yards, more or less, of hard rock excavation.

Item 3 900 cubic yards, more or less, of tunnel excavation for cut-off wall.

Item 4 1,000 lineal feet, more or less, of 2½″ drilled grout holes.

Item 5 500 sacks, more or less, of cement grouting.

Item 6 43,000 cubic yards, more or less, of plain concrete.

Item 7 800 cubic yards, more or less, of reinforced concrete.

Item 8 2,400 board feet, more or less, of rough No. 1 Douglas Fir for Spillway Bridge.

Item 9 640 lineal feet, more or less, of galvanized wrought iron pipe hand railing.

Item 10 A concrete bulkhead in old water tunnel.

Item 11 160 lineal feet of riveted steel discharge pipe installed in place.

[77] All work connected with the construction of the dam complete in every detail, whether so specifically stated in the specifications or not, shall be included in and paid for under these items and paragraph 17 of the General Specifications.

6. DRAWINGS:

The location of the work, profile and cross sections are all shown upon the attached Maps, which may also be seen at the office of the Chief Engineer, Los Angeles County Flood Control District, Los Angeles, California.

7. CLEARING AND GRUBBING:

The Contractor shall clear, grub and remove from the site of the work all trees and brush; all compensation for and expenses incident to the fulfillment of the provisions of this section shall be considered as having been included in the price per yard of loose rock excavation stipulated by the agreement.

8. EXCAVATION—CLASSIFICATION:

All excavation under this contract shall be di-

vided into three classes, namely: loose rock, solid rock excavation and tunnel excavation; solid rock will be all solid ledge rock which requires drilling, blasting, barring, wedging or other effective means for removal and all boulders containing one cubic yard or more; and all other material excavated shall be classified as loose rock; except that all kinds of material excavated in the tunnel for the cut-off wall shall be classified as Tunnel Excavation.

9. EXCAVATION—WORK:

The contractor shall make all excavation for the dam, spillway, trenches, foundations, cut-off walls, alterations and for all other purposes which the Engineer may require.

10. EXCAVATION—LIMITS:

The drawings show, as nearly as it is practicable to determine beforehand, the depth, width and slope for the proposed excavation but all such limits are estimated only and will be finally determined as the work progresses—no excavation outside the prescribed limits will be paid for except when so specifically ordered.

11. BACK FILLING:

Excavated spaces remaining around the work shall be refilled to the elevation of the surface of the ground as it existed before the commencement of the work, unless otherwise directed by the Engineer by good sound material, free from vegetable matter or refuse of any kind, carried up in layers not to exceed one (1) foot in thickness and thoroughly tamped into place. All clods, hard lumps of earth or rocks larger than five (5) inches in the greatest

dimensions, shall be broken before being placed in the fill.

[78] 12. ROCK EXCAVATION FOR FOUNDATIONS:

The Contractor shall make all excavations necessary for the entire dam and for all appurtenant structures. Excavation shall be made to a sufficient depth to secure a foundation on sound ledge rock, free from open seams or other objectionable defects. It is the intention to build the masonry upon the bottom and against the sides of these rock excavations and to preserve the rock outside the lines of the excavation in the soundest possible condition and to obtain over the whole foundation a rock surface free from open seams or cracks, and unusual precautions will be required in excavating. Blasting may be done to the extent directed, with explosives of such moderate power and in such positions as will neither crack nor damage the rock outside of the prescribed limits of the excavations; whenever, in the opinion of the Engineer, further blasting is liable to injure the rock upon or against which the masonry is to be built, the use of explosives shall be discontinued and the excavation of the rock continued by wedging and barring, or other approved methods. A cut-off trench will be required at the heel for the whole length of the dam.

13. PREPARATION OF ROCK FOUNDATIONS:

The surfaces of the rock foundations shall be left sufficiently rough to bond well with the concrete. Care must be taken not to open or break the ledge

rock unnecessarily. Before laying the masonry on or against the ledge rock, the latter shall be scrupulously freed from all dirt, gravel, scale, loose fragments and other objectionable substances, and streams of water under sufficient pressure, stiff brooms, hammers, and other effective means shall be used to accomplish this cleaning. All springs shall be piped and grouted or carried outside the dam. After cleaning and before concrete is laid on or against the foundation, all the water shall be removed from the depressions so that the surface can be inspected to determine whether seams or other defects exist and no concrete shall be deposited upon any part of the dam foundation until the approval of the Engineer has been obtained for that particular part. Small seams and cavaties showing on the base and face of excavation where masonry is to be placed shall be carefully scraped and cleaned out and filled with rich concrete or mortar rammed in under pressure. All holes that were drilled in the river bed at the time when soundings were made to select a location for the dam and that penetrated the actual foundation of the dam, shall be grouted.

14. EXCAVATION—PAYMENT:

The excavation to be paid for shall include the quantity in cubic yards excavated in accordance with the plans, specifications and the instructions of the engineer and shall be measured in excavation only. The limits of the open cut excavation which will be paid for will in general be three feet outside of the neat lines of the masonry and shall have

vertical slopes, or such other limits as the Engineer may direct. Tunnel excavation limits paid for shall be as close as possible to the masonry lines. "The contract price per cubic yard shall include the excavation of all material by any method whatsoever," the leading, transporting and depositing of the same in the manner prescribed and in the places designated, back filling as specified and all other expenses incidental to the work of excavating.

[79] 15. GROUT HOLES—DRILLING:

The contractor shall drill or make all grout holes of two and one-half inches (2½") diameter or larger, as the Engineer may direct and in the places designated.

16. GROUT HOLES—PAYMENT:

All compensation for and expenses incidental to the drilling of great holes shall be considered as included in the price per lineal foot of grout hole drilling as stipulated in the agreement.

17. GROUT—MIXING AND USING:

The contractor shall grout all places as directed and in an approved manner. The apparatus for mixing and for placing grout shall be of a type that has been successfully used and shall be equal in efficiency to a machine having for its essential parts an air-tight chamber in which the cement and water are mechanically or pneumatically stirred and from which they are forced by air under a pressure of 90 pounds per square inch into the space to be grouted. Whenever it is known in advance that grout is to be used in any place, pipes through which the grout may be forced shall be set as the

work progresses—in other cases, suitable holes shall be drilled. When required the Contractor shall drill test holes to determine the efficiency of the filling made. If these tests reveal the fact that any voids yet remain more and other holes shall be drilled and grouted. All testing shall be done by water pressure from elevated tanks so that the pressure during the test will be equal to a head of 10 feet greater than the head over the hole when the Reservoir is full. This process shall be repeated until satisfactory results are obtained. All grout shall be composed of neat cement and water, or as otherwise directed.

18. GROUTING—PAYMENTS:

All compensation for the expenses incidental to grouting shall be considered as included in the price per bag of cement for grout stipulated in the agreement. The drilling of grout holes will be paid for under paragraph 16, and item 4.

19. WATER:

The Contractor is to provide abundant clean water for all parts of the work. No water which is stagnant, acid, alkaline, oily, dirty or which contains any impurities that would be injurious to the concrete shall be used in mixing any concrete.

The contractor assumes all risk of damage from floods and storms and water in all quantities encountered, and all expense incident to necessary protection of the work from damage and delay by such storms or floods and all expenses incident to the proper removal of all water interfering with the work.

[80] 20. FORMS:

Substantial forms shall be made against which to place the concrete. Sheathing for outside faces which is to be used more than once shall be given a coat of grease or distillate oil before being used the first time, and shall be given subsequent coatings whenever such coating is necessary to prevent adhesion of the mortar. All wooden forms shall be thoroughly wet down before placing concrete against them. When metal or metal covered forms are used the surface against which concrete is to be cast shall be thoroughly cleaned and soaped or oiled each time before using.

In order to secure the smoothest practicable finish wherever the concrete is to be part of a waterway, special care will be used in making the forms and wherever practical metal or metal covered forms will be used to this end.

All forms shall be removed with great care especially in the waterways, so as to avoid injury to the concrete.

Clean-out holes will be left in the forms wherever ordered by the Engineer.

Small rods or bolts will be allowed to hold the forms in the structures provided proper means be used to take out a portion of each of the rods nearest the surface at least 2″ in length; all holes left after the removal of the rods shall be filled immediately and completely with cement mortar and the surface left smooth and in good condition.

21. CONCRETE—PLAIN:

All plain concrete shall be of one class and shall

be paid for at one unit price, to-wit: that agreed upon herein. Plain concrete will be used largely in the dam, spillway and footings or as directed and it shall consist of an intimate mixture of Portland cement, river sand up to ¼″ grain, run of the crusher rock with the dust screened out, or screened gravel varying in sizes from ¼″ to 3″ in the proportion by volume of 1 part cement, 3 parts sand and 6 parts crushed rock or screened gravel. Or the concrete may be made in such other proportions as the Engineer may direct; or, concrete of different proportions may be used in different parts of the dam and the aggregate may be previously and mechanically separated into as many as four sizes and remixed as the engineer may direct; and for the preparation and laying of such different proportions and grading or sizing and re-mixing of aggregate there will be no extra charge by the Contractor.

22. CONCRETE—REINFORCED:

Reinforced concrete will be used where shown on the plans. This class of concrete will consist of a 1–2–4-mixture with the steel properly imbedded and thoroughly tamped. The coarse aggregate shall consist of gravel or broken stone not exceeding 1½″ in its longest dimension or smaller as required by the Engineer.

[81] 23. CEMENT:

All cement will be of the best grade of Portland cement and conform to the latest requirements of the American Society for Testing Materials. All cement will be furnished by the District and will be delivered to the contractor f. o. b. cars at the

nearest siding at San Dimas. The contractor will be held responsible for demurrage to the railroad company and shall unload and haul the cement from the railroad station to the work; he shall furnish suitable warehouses or sheds for storing the same until used and will be held responsible for any loss of or damage to the cement after it is delivered at the railroad station. The contractor will be held responsible for the return of the full number of sacks to the railroad station in serviceable condition, baled for shipment and will be charged for all lost or damaged sacks at the same rate as paid by the District. The contractor must give the engineer at least 30 days notice in writing as to when and where he wants cement shipped and shall state the amount required which must be expressed in even carload lots. In case the District desires to ship cement before receiving the contractor's notice the engineer will notify the contractor in writing at least 30 days in advance of such shipment and the contractor shall receive, unload, transport and store said cement in the manner and with the responsibilities above specified.

24. SAND:

The sand must be acceptable to the Engineer and shall be free from oil, vegetable, loam and organic matter and excessive proportion of fine flakes of mica or other objectionable materials, and shall not contain more than five (5) percent by weight of clay or silt or both. The contractor shall furnish sand of such coarseness that all of it will pass a screen having four meshes per lineal inch and at

least forty (40) per cent., but not more than eighty-five (85) percent shall, when tested, be retained on a thirty (30) mesh per lineal inch sieve.

25. CRUSHED ROCK OR SCREENED GRAVEL:

The stone or screened gravel shall be clean, hard and have a specific gravity of not less than 2.50. The use of unscreened gravel is absolutely prohibited. Gravel or stone containing soft, flat or elongated particles will be rejected. Stone from which any of the smaller sized pieces have been screened out will not be accepted. The broken stone shall be run of the crusher with dust removed, and shall vary in size from one-quarter of an inch up to three inches, according to the character of the work in hand—it being the intention to use the three inch stone in the main body of the dam, but to use finer stone for the thinner and re-inforced positions of the concrete.

[82] 26. PLUMS:

Plums in concrete masonry are defined as rocks or boulders whose smallest dimension is not less than six (6) inches embedded in mass concrete. They shall be of sound native rock or hard boulders. No thin flat plums or those of a brittle flaky nature or with projections which might be easily broken off will be permitted.

Before being embedded in the concrete all plums shall be thoroughly cleaned and scrubbed free from all foreign matter and loose particles and well soaked to insure a good bond with the concrete. They shall not be closer than six (6) inches or one-half

their diameter in the clear between each other and from the forms against which the concrete is cast. At the horizontal building joints care will be taken to have a number of plums projecting one-third (⅓) their depth above the concrete to insure a good bond with the succeeding work.

In walls and thin sections no plums will be used and in no case will aggregate be permitted which has any dimension greater than one-third (⅓) the minimum thickness of the section.

27. REINFORCING STEEL:

All reinforcing steel will be furnished by the District f. o. b. the nearest siding and will be of standard type and quality of reinforcing steel on the market.

28. CONCRETE—MIXING:

In general, all mixing shall be done by machine, which shall be subject to the approval of the Engineer who may condemn any machine whenever he considers that it fails to perform the mixing or the proportioning of the ingredients in a satisfactory manner. Any machine so condemned must be removed and another substituted. A batch mixing machine must be used in which the materials, including the water, can be precisely and regularly proportioned and which will produce a concrete of uniform consistency and having the ingredients thoroughly mixed. Continuous mixers will not be allowed on the work.

The measurement of the cement, sand, gravel, stone and water must be made in an accurate, regular and uniform manner satisfactory to the Engi-

neer. A spiral or screw feed will not be permitted for proportioning the materials. In mixing concrete by machine a sufficient number of turns shall be made to thoroughly mix the ingredients and shall continue at least one (1) minute after all the materials are assembled in the mixer.

The proportioning of the ingredients and the manner and time of their mixture will at all times be under the control of the Engineer.

[83] Hand mixing may be allowed by the Engineer for small quantities of concrete; in which case it will be done on tight level platforms, and shall not be made in batches requiring more than one barrel of cement. The detail of the hand mixing shall be as follows: The broken rock or screened gravel shall be spread in an even layer on the platform; on this layer shall be spread the sand, the two layers being not more than one foot in depth; on this the cement shall be spread; and the whole shall be turned with shovels and not less than six times, not including the shoveling into the wheel barrows. The turning will generally be three (3) times dry and three (3) times wet. In wetting the mixture a spray or sprinkler will be used and care will be taken not to wash the cement away from the other aggregates.

29. CONCRETE—PLACING:

All forms not freshly oiled shall be wet before concrete is run into them. Concrete shall be placed immediately after mixing and no concrete shall be used after it has taken its initial set, or from any cause has become unfit for good work. It shall be

conveyed to place in such a manner that there will be no separation of the different ingredients and where such separation inadvertently occurs the concrete shall be remixed before placing. Concrete shall, where practicable, be spread in horizontal layers. Mixtures of a medium consistency that require ramming shall be spread in layers not over (8) eight inches thick and shall be thoroughly tamped. The top of concrete under construction shall be kept at all times approximately level between contraction joints or such limits as may be required, except that the down stream side shall be kept generally higher than the up stream side. Special care shall be taken to obtain as nearly horizontal a joint as is practicable at the end of each days run in order to minimize unsightly appearances due to lipping. The layers of concrete must in no case be tapered or wedge-shaped. In construction or building joints where no plums are used grooves shall be made parallel to the axis of the dam so as to aid the bonding of the succeeding work. Pinnacles for landing machinery or materials shall not be built.

Before placing fresh concrete upon concrete which has set the latter shall be washed and swept clean of all dirt, chips, sawdust, rock piles, shavings, scum or laitance and be thoroughly wetted and slushed with mortar consisting of one part cement and two parts sand, and throughout the work all concrete shall be kept free from admixture with foreign matter.

Concrete must not be deposited under water. The Contractor shall keep in operation pumps of sufficient capacity to maintain the water level below fresh concrete.

If it be necessary to make a joint in any part the said joint shall be vertical and at such point as the Engineer may direct.

[84] 30. PLACING REINFORCEMENT:

Rods shall be accurately spaced and placed where shown on the drawings. They shall be firmly held in position until embedded in the concrete. They shall be tightly wired together at all intersections with No. 14 wire. Where there are no intersecting rods to tie to, horizontal rods shall then be laid on supporting wires in proper position before placing concrete. Placing rods on layers of fresh concrete as the work progresses will not be permitted.

Rods may be spliced by lapping their ends sixty (60) times the diameter or side of the rod unless other laps are shown in the drawings. Rods shall stop at expansion joints. Rods before being embedded shall be adequately supported so that they will not become bent by being walked on, or from other causes. All blocking and supports must be removed as the concreting progresses. Adjustment of bars during the placing of concrete will not be allowed.

All bars shall be thoroughly cleaned of rust, scale, dirt, or other coating that would impair the bond before placing in concrete.

When reinforcing rods have been placed the Engineer shall be notified and permission from him given to proceed before any concrete is placed on them.

31. CONTRACTION JOINTS:

At such intervals and depths as are shown on the drawings or as directed, contraction joints normal to the axis of the dam shall be formed of masonry built against forms; such faces shall be coated with acceptable material to prevent adhesion to the masonry on the other side of the joint. The contraction joints will divide the dam into approximately three sections; and as the work progresses, the end sections shall be carried ahead of the middle section as much as ten feet or as directed. The expense of all such joints shall be included in the cost of placing concrete. Derricks or other hoisting and conveying apparatus may, when the concrete is of acceptable strength be placed on any section.

32. FINISH AND CARE OF EXPOSED SURFACES:

The facing of the dam and all other masonry which will be permanently exposed to view shall be effectively protected from injury or disfigurement. The Contractor shall use all care to avoid discolorations or marks on the surface and no tie wires shall be left in the concrete nearer than two (2) inches to the exposed faces. In depositing the concrete the coarse aggregate shall be carefully spaded away from the forms with the proper tools.

Within twenty-four hours after the forms have been removed from any part of the work, any cavities or stone pockets must be neatly filled with cement mortar mixed in the same proportions as were used in the body of the concrete, so applied

as to resemble as nearly as possible the adjacent surface. All unsightly ridges and lips must be rubbed down and any local bulging on showing surfaces, caused by displacement of the forms, shall be remedied by tooling.

[85] All surfaces of concrete not cast against forms shall be troweled and rubbed to a smooth finish by skilled workmen; and all such faces shall be of an even texture and color.

33. MASONRY TO BE KEPT MOIST:

All concrete shall be kept moist for at least the first two weeks.

34. CONCRETE WORK INCLUDED IN THE PRICE:

The concrete to be paid for shall be the number of cubic yards, or fraction thereof, included within the neat lines shown on the drawing or ordered by the Engineer.

The work included in the price per yard of plain and reinforced concrete of whatever proportions of mix shall be the transporting and furnishing of all materials (excepting those furnished by the District as specified in paragraph 3) all labor, forms, tools and machinery, and the placing of the reinforcing steel.

35. SLUICE GATES:

The contractor shall prepare the proper recesses and foundations and place the necessary anchor bolts for the sluice gates and operating machinery which will be installed by the District. The District will furnish the necessary drawings and templets. The cost of the work specified in this section

will be included in the price paid per lineal foot of discharge pipe.

36. DISCHARGE PIPE:

The discharge pipe will be furnished by the District f. o. b. San Dimas. The Contractor shall furnish all material (except the pipe) and all labor incidental thereto and shall unload and transport from the place of delivery, install, erect, caulk and paint both inside and outside with an approved asphalt paint.

All work specified in this paragraph and in paragraph 35 is included in the price paid per lineal foot of discharge pipe; except that any excavation for the pipe or supports outside the masonry lines of the dam shall be paid for as such under Item 1 and 2, and the concrete chairs supporting the pipe outside the dam shall be paid for as reinforced concrete under Item 7.

37. PAINTING:

The lumber used in the foot bridge over the Spillway shall be clear No. 1 Douglas Fir and shall be painted in a satisfactory manner with two coats of a good quality of oil and lead paint of an approved color.

38. PIPE RAILING:

The pipe for pipe railing shall be standard wrought iron pipe, heavily galvanized, smooth and round. All fittings and connections shall be galvanized and of the "Spherical" type. The mesh fencing shall be 2″ x 2″ 12″ x″ Galvanized Clinton Welded Fabric or similar and acceptable to the Engineer. The rail [86] shall be constructed in a

workmanlike manner true to the lines shown on the plans.

39. REMOVAL OF UNUSED MATERIAL, RUBBISH, ETC.:

All unused material, and rubbish of any kind, must be removed and deposited in a place suitable to the Engineer and in a neat and satisfactory manner. All work shall be left in a neat and orderly condition.

Now, March 19, 1931, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[87] Filed Aug. 30, 1926. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 18,458.

H. STANLEY BENT,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition filed

in the above-entitled appeal, admits, denies and alleges as follows:

1. (a) Admits the allegations contained in subdivision (a) of paragraph 1 of the petition.

(b) Admits the allegations contained in subdivision (b) of paragraph 1 of the petition.

(c) Admits that a deficiency letter was mailed to the taxpayer on May 13, 1926, and states a deficiency in tax for the year 1920 in the amount of $12.73. Denies that the deficiency letter is erroneous in that said letter should have included the year 1922, and further denies that the deficiency for both of these years affects the years 1919 and 1921. Alleges that the tax liability as determined by the Commissioner of the petitioner for the year 1922 is in the amount of $65,946.78, and further alleges that the amount of tax for said year assessed against said petitioner, as shown by the petitioner's original return for said year is in the amount of $66,-617.80, resulting in an overassessment for the year 1922 in the amount of 671.02. [88] Admits that due to an error in addition of the tax an item of $160.00, being 4% upon $4,000.00, was added as $1,600.00, indicating an error in addition of $1,-440.00 against the tax shown on the face of the petitioner's return for the year 1922. Denies that said error results in the determination of the deficiency for the year 1922, but alleges that an overassessment has been determined and that therefore this Board is without jurisdiction to hear and determine the petitioner's appeal for the year 1922.

The Commissioner further alleges that this Board

is without jurisdiction to hear and determine the appeal of this taxpayer for the year 1921 inasmuch as the taxpayer's tax liability for said year has been determined to be in the amount of $412.95 and the amount assessed on the original return of the petitioner for said year is in the amount of $521.54, resulting in an overassessment of $108.59.

Neither admits nor denies the allegations contained in the first sentence of the second paragraph of subdivision (c) of paragraph 1 of the petition for the reason that such allegations are not deemed to be material to the issues before this Board, but if deemed to be material at the time of hearing of the appeal, they are specifically denied.

Denies the allegations contained in the second sentence of the second paragraph of subdivision (c) of paragraph 1 of the petition.

Denies the allegations contained in the third paragraph of subdivision (c) of paragraph 1 of the petition.

[89] 2. Admits that the deficiency asserted by the Commissioner represents income tax for the year 1920 in the amount of $12.73, but denies that a deficiency tax against this petitioner has been asserted by the Commissioner for the year 1922 in the amount of $768.98.

3. Denies that the Commissioner erred in the determination of the deficiency tax.

4. (a) Neither admits nor denies the allegations contained in subdivision (a) of paragraph 4 of the petition, for the reason that such allegations do not appear to be material to the issue. but if

deemed by this Board to be material upon hearing, they are specifically denied.

(b) Denies the allegations contained in subdivision (b) of paragraph 4 of the petition.

(c) Admits that during the years 1918 to 1922, inclusive, the taxpayer was engaged in the business of assisting in the conduct of the operations of Bent Brothers, a partnership, from which partnership he drew a salary but for lack of information denies the remaining allegations contained in subdivision (c) of paragraph 4 of the petition.

(d) Admits that the petitioner is a member of the firm of Bent Brothers, general contractors, who are engaged particularly in the construction of dams, reservoirs, pipe-lines, water works, drainage systems, and similar works. For lack of information, denies the remaining allegations contained in subdivision (d) of paragraph 4 of the petition.

[90] (e–j) For lack of information sufficient to form a belief, denies the allegations contained in subdivisions (e) to (j), inclusive, of paragraph 3 of the petition.

(k) Admits that amended returns were made by the petitioner for the years 1919 to 1922, inclusive, but denies that a correct segregation of the cost and income was set out in said returns. Denies the remaining allegations contained in subdivision (k) of paragraph 4 of the petition.

Admits that the books of account were kept, and the income tax returns were filed by the partnership of Bent Brothers for the taxable years in controversy, upon the accrual basis, but denies specifically

that said partnership is entitled to report its income for income tax purposes on the long term contract basis.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinabove admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
D. D. SHEPARD,
Special Attorney,
Bureau of Internal Revenue.

Now, March 19, 1931, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[91] Filed Mar. 19, 1931. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 18,458.

H. STANLEY BENT,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED ANSWER AS STATED IN TRANSCRIPT OF HEARING JULY 8, 1929.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for amended answer to the petition filed in the above-entitled appeal, admits, denies and alleges as follows:

1. (a) Admits the allegations contained in subdivision (a) of paragraph 1 of the petition.

(b) Admits the allegations contained in subdivision (b) of paragraph 1 of the petition.

(c) Admits that a deficiency letter was mailed to the taxpayer on May 13, 1926, and states a deficiency in tax for the year 1920 in the amount of $12.73. Alleges that the correct deficiency for the year 1920 is $60.50. Denies that the deficiency letter is erroneous in that said letter should have included the year 1922, and further denies that the deficiency for both of these years affects the years 1919 and 1921. Alleges that the tax liability as determined by the Commissioner of the petitioner for the year 1922 is in the amount of $65,946.78, and further alleges that the amount of tax for said year assessed against said petitioner, as shown by the petitioner's original return for said year [92] is in the amount of $66,617.80, resulting in an overassessment for the year 1922 in the amount of $671.02. Admits that due to an error in addition of the tax an item of $160.00, being 4% upon $4,000.00, was added as $1,600.00, indicating an error in addition of $1,440.00 against the tax shown on the face of

the petitioner's return for the year 1922. Denies that said error results in the determination of the deficiency for the year 1922, but alleges that an overassessment has been determined and that therefore this Board is without jurisdiction to hear and determine the petitioner's appeal for the year 1922.

The Commissioner further alleges that this Board is without jurisdiction to hear and determine the appeal of this taxpayer for the year 1921 inasmuch as the taxpayer's tax liability for said year has been determined to be in the amount of $412.95 and the amount assessed on the original return of the petitioner for said year is in the amount of $521.54, resulting in an overassessment of $108.59.

Neither admits nor denies the allegations contained in the first sentence of the second paragraph of subdivision (c) of paragraph 1 of the petition for the reason that such allegations are not deemed to be material to the issues before this Board, but if deemed to be material at the time of hearing of the appeal, they are specifically denied.

Denies the allegations contained in the second sentence of the second paragraph of subdivision (c) of paragraph 1 of the petition.

Denies the allegations contained in the third paragraph of subdivision (c) of paragraph 1 of the petition.

[93] 2. Admits that the deficiency asserted by the Commissioner represents income tax for the year 1920 in the amount of $12.73, but denies that a deficiency tax against this petitioner has been as-

serted by the Commissioner for the year 1922 in the amount of $768.98.

3. Denies that the Commissioner erred in the determination of the deficiency in tax for the year 1920 except that the respondent admits the allegations of error contained in subparagraph (b) of paragraph 3 of the petition.

4. (a) Neither admits nor denies the allegations contained in subdivision (a) of paragraph 4 of the petition, for the reason that such allegations do not appear to be material to the issue but if deemed by this Board to be material upon hearing, they are specifically denied.

(b) Denies the allegations contained in subdivision (b) of paragraph 4 of the petition.

(c) Admits that during the years 1918 to 1922, inclusive, the taxpayer was engaged in the business of assisting in the conduct of the operations of Bent Brothers, a partnership, from which partnership he drew a salary but for lack of information denies the remaining allegations contained in subdivision (c) of paragraph 4 of the petition.

(d) Admits that the petitioner is a member of the firm of Bent Brothers, general contractors, who are engaged particularly in the construction of dams, reservoirs, pipe-lines, water works, drainage systems, and similar works. For lack of information, denies the remaining allegations contained in subdivision (d) of paragraph 4 of the petition.

[94] (e–j) For lack of information sufficient to form a belief, denies the allegations contained in

subdivisions (e) to (j), inclusive, of paragraph 4 of the petition.

(k) Admits that amended returns were made by the petitioner for the years 1919 to 1922, inclusive, but denies that a correct segregation of the cost and income was set out in said returns.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinabove admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied and that the Board find that there is a deficiency in income taxes of this petitioner for the year 1920 in the sum of $60.50.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. E. MATHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 19, 1931, the foregoing amended answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

3–19–31.

[95] A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

19 B. T. A. ——.

United States Board of Tax Appeals.

DOCKET No. 18,458.

Promulgated February 28, 1930.

H. STANLEY BENT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

The method of accounting of a partnership engaged in construction projects, some of which were not completed within a year, was to set up a separate account for each project. The charges of each project, representing costs and expenses, and the credits, representing periodical compensation, were carried in the project account. The project account was not closed until the project was completed and accepted, and then gain or loss on the project was transferred to profit and loss of the business. Profit or loss was not computed annually. Tax returns had consistently been made on the so-called term contract basis. *Held,* the method used correctly reflected income, returns in accordance therewith were proper, and partner had no right to have taxable income from

uncompleted projects computed on an annual accrual basis.

The fact that taxpayer correctly enters his current transactions in primary accounts and that net income could be calculated therefrom each year is not sufficient to establish that he is entitled, contrary to his regular practice, to have his income for a single year from uncompleted projects computed upon an annual accrual basis.

W. H. TEASLEY, C. P. A., and JULIUS V. PATROSSO, Esq., for the Petitioner.

J. E. MATHER, Esq., for Respondent.

The Commissioner determined a deficiency in income tax for 1920 of $12.73. Petitioner attacks this because respondent has (1) disallowed a part of the net loss alleged to have been sustained for 1919, (2) disallowed expense items totaling $3,115.67 as deductions in computing the partnership net income for 1922 and allocating such expenses to 1920 and 1921 in the amounts of $1,102.40 and $2,013.27, respectively, and (3) determined the partnership net income for 1920 by a long-term contract method of accounting instead of the annual accrual method.

[96] FINDINGS OF FACT.

Petitioner, a citizen and resident of the State of California, was during 1920 a member of the firm of Bent Brothers, a partnership composed of himself and Arthur S. Bent. The partnership is engaged in the construction, under contracts, of dams,

reservoirs, canals and similar projects. Frequently such projects are not completed within the same taxable year in which the work is begun.

The method of accounting regularly employed in keeping the partnership's books, from the inception of the business in 1910 until the partnership was succeeded by a corporation in 1923, was as follows. A separate account was kept in the partnership books for each project undertaken. At the end of the month this account was charged with the cost, whether paid or not, of all labor, materials and direct expenses incurred during the month and chargeable to the project. At the close of the year the account was charged with its proportion of the indirect expenses, or overhead, of the business incurred during the year, whether paid or not. The overhead was distributed over the several projects upon which work had been performed during the year in the same proportions that the total costs of each project incurred during the year bore to the total costs of all projects incurred during the year. If the contract provided for payment upon completion of the project, the customer's account was charged and the separate account of the project was credited, when all work was completed and accepted. If payment was to be made as the work progressed, upon the basis of monthly estimates by the customer's engineer of work completed during the month and the amount of payment due therefor, the customer's account was charged, and [97] the separate account of the project was credited, as such estimates were received, with the amount of

payment shown to be due by the estimate. If the contract provided that a percentage of the amount due on each estimate was to be withheld pending completion and acceptance of the project, the separate account of the project was credited only with the payment due and the amount of the holdback was credited to "Retention Account." No accounting was made for any gain or loss on any project until the work was completed and accepted. Until that time, the debit balance in a project account was considered an investment and carried on the books as an asset. When work was completed and the project accepted, the project account was closed by transferring the balance representing gain or loss to profit and loss account.

The net income reported by the partnership in all returns filed for federal income tax purposes was computed in accordance with the method of accounting employed in keeping the books.

During 1920 the partnership was engaged on four projects which were not completed in the same taxable year in which work was begun. Devil's Gate Dam was commenced in 1919 and completed in 1920; work on Huntington Part Reservoir began in 1920 and was completed in 1921; work on Rodeo Drain started in 1920 and was completed in 1921; and work on San Dimas Dam began in 1920 and was completed in 1922.

Devil's Gate Dam was constructed under contract with the Los Angeles County Flood Control District. This contract provided that compensation should be paid to the partnership upon the basis

of monthly estimates of materials furnished and work completed at the following rates:

[98]

Item 1. For 3,000 cubic yards dry earth excavation at the unit price of $1.80 per cubic yard .....Total Amt. $ 5,400.00

Item 2. For 2,000 cubic yards wet earth excavation at the unit price of $1.80 per cubic yard.....Total Amt. $ 3,600.00

Item 3. For 3,000 cubic yards dry solid rock excavation at the unit price of $3.85 per cubic yard .....Total Amt. $ 11,550.00

Item 4. For 3,000 cubic yards wet solid rock excavation at the unit price of $3.85 per cubic yard .....Total Amt. $ 11,550.00

Item 5. For 28,350 cubic yards concrete which may have large stones embedded at the unit price of $2.55 per cubic yard .....Total Amt. $ 72,292.50

Item 6. For 4,000 cubic yard plain concrete at the unit price of $2.55 per cubic yard..... .....Total Amt. $ 10,200.00

Item 7. For 1,000 cubic yards reenforced concrete at the unit price of $11.60 per cubic yard.....Total Amt. $ 11,600.00

Item 8.	For 620 lineal feet precast hand rail, lamp posts, etc., at the unit price of $7.50 per lineal foot.....Total Amt. $	4,650.00
Item 9.	For 620 lineal feet of 2″ fibre conduit with No. 6 copper wire pulled into conduit and lamp posts set in place at the unit price of $1.00 per lineal foot .....Total Amt. $	620.00
Item 10.	For 300 lineal feet of concrete lined tunnel at the unit price of $71.00 per foot..... .....Total Amt. $	21,300.00
Item 11.	For 10,000 pounds steel reenforcement at the unit price of $.06 per pound.... .....Total Amt. $	600.00
Item 12.	For 6,300 square foot road surfacing at the unit price of $.15 per square foot.... .....Total Amt. $	945.00
Item 13.	For 3,000 lineal feet 2–½″ drilled grout holes at the unit price of $5.00 per lineal foot.....Total Amt. $	15,000.00
Item 14.	For the work of placing 1,000 sacks cement in grouting at the unit price of $.60 per sack.....Total Amt. $	600.00

Item 15. For extra work, the amount specified in Section 19 of the general conditions and definitions.

Total amount of this bid is.....$169,907.50

[99] Compensation shown to be due by the monthly estimates of the chief engineer of the Flood Control District were usually paid by the 10th of the following month.

In accordance with the method of accounting employed in keeping the books, the partnership included in the return for 1920 the entire compensation received for and all of the costs and expenses incident to the construction of Devil's Gate Dam which was completed in that year, but did not include the income or expenses relating to the three other projects commenced but not completed in that year. It was the partnership's custom to report income from each job when it was completed.

OPINION.

STERNHAGEN.—The respondent determined a deficiency for 1920 and overassessments for 1919, 1921, and 1922. As to the latter, the Board is without jurisdiction, Cornelius Cotton Mills, 4 B. T. A. 255, and numerous later decisions, Roberts Manual, Part I, p. 540.

The item as to alleged net loss of 1919 has apparently been abandoned, as there is neither evidence nor argument in respect of it.

The petitioner assigns and respondent concedes an error in shifting a deduction of $1,102.40 for expense from 1922 to 1920. The facts do not appear,

so we must accept the mutual concession and require that the net income of 1920 be increased by this amount.

The principal contention of the petitioner is that the partnership income should be computed each year on an annual accrual basis. This is predicated upon the view, looking at Revenue Act of 1918, section 212, that this is in accordance with the method of accounting regularly employed and that such method clearly reflected its income. The respondent, in determining the deficiency, has adhered to the method of computation [100] adopted by the partnership in its tax returns and consistently used for many years including 1920, namely, the so-called long-term contract method. By this method, net income from each contract has regularly been computed in the year of its completion. The petitioner, notwithstanding its practice since 1913 of filing returns on the term contract basis and its use of that basis in the return for 1920, now seeks to overthrow this deficiency by having this method set aside and the annual method substituted. The argument by which this is attempted to be supported is that its accounts have been kept that way, and this is sought to be demonstrated by showing that the accounts at the end of each year contain data disclosing gross income accrued and deductions incurred.

It is true that monthly estimates and receipts of each project were accounted for monthly, and its costs and expenses were entered as incurred. They were entered, however, not in general accounts but in specific contract accounts, and were not carried

into the earnings of the business until the project was completed. Meanwhile, costs of labor and material, and expenses, direct and indirect, so charged in the project account were treated as investment in the project and carried as an asset on the books; and compensation so accrued monthly and credited in the project account was treated "as a reduction of cash investment in the project." Not until the completion of the project were these carried into profit and loss to determine gain or loss in the business.

This in our opinion shows that the partnership's and petitioner's returns were properly made on the contract basis, that this was in accordance with the accounting method regularly employed, and respondent [101] was fully justified in adopting this method in auditing the return. See James C. Ellis, et al., 16 B. T. A. 1225. The fact that some of the contracts were performed within a year and some took longer, creates no inconsistency in the method and does not detract from a clear reflection of income. It is not controlling that the primary accounts were currently kept so as to permit net earnings to be calculated at the end of each year. This is merely saying that all financial items were honestly recorded when they occurred, which is a postulate of any system of accounts. The method of accounting is not determinable alone from this, but is reflected rather by the system in which these primary entries were carried forward to ascertain periodical gains or losses. When, as here, the specific project accounts have been withheld from profit and loss

until the completion of the project and this in disregard of any intervening annual period, it cannot be said that the taxpayer's accounting method is one of the annual accrual of net income.

Furthermore, since the deficiency has been determined by this method and petitioner has not established what in fact was the income resulting from the method he suggests with the consequent tax liability, the deficiency could not be set aside on the record in any event.

Judgment will be entered under Rule 50.

Now, March 19, 1931, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[102] United States Board of Tax Appeals,
Washington.

DOCKET No. 18,458.

R. STANLEY BENT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JUDGMENT.

Pursuant to the report of the Board promulgated February 28, 1930, 19 B. T. A. 181, the respondent filed a computation of deficiency which

petitioner has stated to be in conformity with the said report. In accordance therewith it is

ORDERED, ADJUDGED and DECREED that there is a deficiency in income tax for 1920 of $60.50.

[Seal]

(Signed) JOHN M. STERNHAGEN,
Member, United States Board of Tax Appeals.

Entered May 14, 1930.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, March 19, 1931, the foregoing judgment certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[103] Filed Oct. 31, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 18,458.

H. STANLEY BENT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, H. Stanley Bent, respectfully shows:

First: This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision of the United States Board of Tax Appeals entered on the 14th day of May, 1930, redetermining the income tax liability of this petitioner for the calendar year 1920, and determining a deficiency in the sum of $60.50.

Second: Your petitioner is a resident of the County of Los Angeles, State of California.

[104] Third: The nature of the controversy before the United States Board of Tax Appeals was the redetermination of income taxes under the Revenue Acts of 1918 and 1921, involving a determination of:

> The correct method of reporting, for income tax purposes, of income from contracts covering the excavation of earth and rock and the placement of concrete, the contractual price of which was per cubic yard and the execution of the work upon which was carried on in more than one calendar year or in more than one taxable year of the petitioner, when the number of units or cubic yards moved or placed was de-

termined monthly by an engineer for the owner, the contract price applied thereto and the amount so determined was entered monthly in the books of a partnership contractor, of which the petitioner was a member, and the cost of execution of the work was entered in the books of the partnership monthly as such cost accrued; and income from cost-plus contracts the performance of which likewise extended over a period of more than one calendar year.

Fourth: The errors committed by the Board of Tax Appeals upon which the petitioner relies as a basis of this [105] proceeding are as follows:

(1) The Board erred in holding that the original returns of the partnership of Bent Brothers and of this petitioner for the calendar year 1920 were made in accordance with the method of accounting regularly employed in keeping the books of the partnership.

(2) The Board erred in holding that the original returns made by the partnership of Bent Brothers and of this petitioner for the calendar year 1920 clearly reflected the annual net income of said partnership and of the petitioner during the said year.

(3) The Board erred in holding that the income derived by the petitioner from unit and cost-plus contracts extending in the course of performance over a period of more than one calendar year or from one calendar year into another calendar year were properly reported in the return filed for the calendar year in which the work was completed or

finished, notwithstanding the fact that a portion of said income was earned and accrued upon the books of the partnership in a preceding calendar year or preceding calendar years, and the amount of net income derived from said contracts during each of said calendar years was clearly reflected in the partnership books of account.

[106] (4) That the Board erred in finding as a fact that the method pursued by the partnership of Bent Brothers and the petitioner in returning net income was in accordance with the method of accounting regularly employed in keeping the partnership books.

(5) That the Board erred in failing to find that the original tax returns filed by petitioner for the years 1920 and 1922 did not correctly reflect his net income for said year.

(6) That the Board erred in finding that the amended income tax return filed by petitioner for the years 1920 and 1922 did not correctly reflect his net income for said years.

(7) That the Board erred in refusing to accept and denying to petitioner the right to file an amended and supplemental petition setting forth the bar of the Statute of Limitations to the collection of the fourth installment of the tax for the calendar year 1922 as shown by the petitioner's original return.

(8) That the Board erred in holding that it did not have jurisdiction to hear or determine the petitioner's appeal with respect to his income tax liability for the calendar year 1922.

[107] WHEREFORE, petitioner prays that this appeal may be allowed and that the Circuit Court of Appeals may review the action of the Board of Tax Appeals in this cause, reverse the decision of the Board and direct the entry of a decision of said Board in favor of the petitioner, determining that there is no deficiency in income tax for the year 1920 due from the petitioner, and directing the assessment of income taxes for the years 1920 and 1922, against the petitioner in accordance with the amended return filed by said petitioner for said calendar years 1920 and 1922, and for such other and further relief as may seem meet and proper in the premises.

JULIUS V. PATROSSO,
Attorney for Petitioner,
1106 Spring Arcade Bldg.,
541 South Spring Street,
Los Angeles, California.

[108] State of California,
County of Los Angeles,—ss.

Julius V. Patrosso, being first duly sworn, deposes and says: I am the attorney for the petitioner in this proceeding. I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge and belief. This petition is not filed for purposes of delay, and I believe the petitioner is justly entitled to the relief sought.

JULIUS V. PATROSSO.

Subscribed and sworn to before me this 30th day of September, 1930.

[Seal] DOROTHY R. BARTON,
Notary Public in and for said County and State.

Now, March 19, 1931, the foregoing petition for review certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[109] Filed Mar. 2, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 18,458.

H. STANLEY BENT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF EVIDENCE.

The above-entitled case came on for hearing before the Hon. John M. Sternhagen, Member of the United States Board of Tax Appeals, on the 8th day of July, 1929, at Los Angeles, California, there being present petitioner and respondent by their respective counsel.

Thereupon proceedings were heard and the testimony of the following witnesses was taken before

said Board: H. Stanley Bent and Wilbur Atkinson.

So much of the proceedings and the evidence as is material and necessary to the determination of the assignments of error set out by petitioner in his petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals is herein set out in narrative form.

Petitioner, through his counsel, thereupon moved the Board for leave to file an amendment and supplement to his petition herein, which have theretofore been forwarded to the Board, and a copy of which have been served upon counsel for the respondent, and which proposed amendment and supplement to the petition is [110] in the words and figures following, to wit:

United States Board of Tax Appeals.

DOCKET No. 18,458.

H. STANLEY BENT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDMENT AND SUPPLEMENT TO PETITION.

The above-named petitioner hereby amends and supplements his petition for a redetermination of the deficiency set forth by the Commissioner of

Internal Revenue in his notice of deficiency, as set out in his original petition, and as a basis for amended and supplemental appeal sets forth as follows:

1. The taxable year regarding which the taxes are in controversy is the year 1922.

(a) Petitioner filed an income tax return for the year 1922 with the Collector of Internal Revenue at Los Angeles, Calif., March 15, 1923, and paid one-fourth of the tax shown as due by said return. Petitioner prior to the filing of his petition herein paid the second and third installments of the tax due by said return but did not pay the fourth or final installment when due, December 15, 1923, and has not paid said fourth or final installment to this date.

(b) The Collector of Internal Revenue at Los Angeles, California, has demanded and is now demanding said fourth or final installment of income taxes for the year 1922 of this petitioner in the amount of $16,654.45 with interest thereon, payment of which [111] fourth or final installment this petitioner is refusing to make on the ground that the Statute of Limitation has run as to the collection thereof.

(c) Income taxes for the year 1922, shown on the return of this taxpayer, were assessed by the Commissioner of Internal Revenue July 14, 1923.

2. Petitioner verily believes and alleges that said action constitutes error on the part of the Commissioner of Internal Revenue in attempting to collect said tax with interest after the expiration of the

period of limitation for the collection thereof, without having entered into an agreement with this petitioner to extend the Statute of Limitations for collection of said tax (Russell vs. United States, 278 U. S. 181) after four years from the date of filing this return.

WHEREFORE, the petitioner prays that in addition to the relief demanded in his original petition this Board may take jurisdiction of said alleged error and may find that the amount of the final installment for the year 1922, in the sum of $16,654.45, is barred from collection by the Statute of Limitation and grant this petitioner relief from the payment thereof.

Respectfully,
W. H. TEASLEY,
Counsel for Petitioner,

W. H. TEASLEY, C. P. A.,
262 Chamber of Commerce Bldg.,
Los Angeles, California.
Telephone—Westmore 8063.

Dated June 19, 1929.

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[112] State of California,
County of Los Angeles,—ss.

H. Stanley Bent, being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read said supplemental petition and knows the contents thereof and that the statements therein made are true except such as are

(Testimony of H. Stanley Bent.)

made on information and belief and as to those he believes it to be true.

H. STANLEY BENT.

Subscribed and sworn to before me this 19th day of June, 1929.

[Seal] J. W. VINETZ,

Notary Public in and for the County of Los Angeles, State of California.

The respondent, through his counsel, opposed the said motion and the filing of said proposed amendment and supplement to the petition, and, after argument, the said motion was by the Board denied.

TESTIMONY OF H. STANLEY BENT, FOR PETITIONER.

..H. STANLEY BENT, having been first duly sworn as a witness on behalf of the petitioner, testified as follows:

Direct Examination.

I am and have been a member of the firm of Bent Brothers for about twelve years, including the years 1920, 1921 and 1922, and during the years 1920 to 1922, both inclusive, I had general supervision of all construction work as well as office management. Arthur S. Bent was the other member of the partnership. The document exhibited to me is an original copy of the contract executed between Los Angeles County Flood Control District and Bent Brothers for erection and construction of Devil's Gate Dam.

[113] There was offered and received in evidence, without objection, an original copy of a contract between the Los Angeles County Flood Control District and Bent Brothers for the construction of a structure known as Devil's Gate Dam, which was marked Petitioner's Exhibit No. 1. So much thereof as is material and necessary to the determination of the assignments of error is as follows:

PETITIONER'S EXHIBIT No. 1.

CONTRACT AND SPECIFICATIONS.

EXHIBIT "A."

ADVERTISEMENT.

FLOOD CONTROL WORKS.

OFFICE OF THE BOARD OF SUPERVISORS. LOS ANGELES COUNTY FLOOD CONTROL DISTRICT.

Los Angeles, California.
January 20, 1919.

"Sealed proposals will be received at the office of the Board of Supervisors, Los Angeles County Flood Control District, Los Angeles, California, until 2 o'clock P. M. February 19, 1919, for the construction of a gravity type, concrete or cyclopean masonry dam across the Arroyo Seco and Appurtenant structures at the place known as Devil's Gate, involving approximately the following principal quantities:

Item 1, about 3,000 cubic yards dry earth excavation;

Item 2, about 2,000 cubic yards wet earth excavation;

Item 3, about 3,000 cubic yards dry solid rock excavation;

Item 4, about 3,000 cubic yards wet solid rock excavation;

Item 5, about 28,350 cubic yards concrete which may have large stones embedded;

Item 6, about 4,000 cubic yards plain concrete;

Item 7, about 1,000 cubic yards reinforced concrete;

Item 8, about 620 lineal feet precast hand rail. lamp posts, etc.;

Item 9, about 620 lineal feet 2″ fiber conduit with No. 6 copper wire as per paragraph 54 of specifications; pulled into conduit and lamp posts set in place;

[114]

Item 10, about 300 lineal feet of concrete lined tunnel;

Item 11, about 10,000 pounds of steel for reinforcement;

Item 12, about 6,300 square feet road surfacing;

Item 13, about 3,000 lineal feet 2½″ drilled grout holes;

Item 14, about 1,000 sacks cement grouting (the work of placing each sack) which works are a part of the system of flood control for Los Angeles County Flood Control District, to be carried out under the authority of the Los Angeles County Flood Act, and are in accordance with the Official Plans of the District.

The right is reserved to reject any and all bids, to accept one part and reject the other and to waive technical defects as the interest of the District may require. On account of the character of the work and the disastrous results that would attend any failure, it has been decided that bids would be considered only from contractors who have had previous experience in the kind of work proposed under these specifications.

Drawings, specifications, proposal blanks and other information may be obtained on application to the Chief Engineer, Los Angeles County Flood Control District, Los Angeles, California, at whose office drawings and other data may be inspected.

AGREEMENT.

THIS AGREEMENT, made and entered into this 29th day of March, in the year One Thousand Nine Hundred and Nineteen by and between Los Angeles County Flood Control District, organized and existing under the Los Angeles County Flood Control Act of California, approved June 12, 1915, acting through its Board of Supervisors by virtue of the power vested in it by said Act, party of the first part, and Arthur S. Bent and H. Stanley Bent, a Co-partnership doing business under the name of Bent Bros., of the City of Los Angeles, County of Los Angeles, and State of California, hereinafter designated as the Contractor, party of the second part,

WITNESSETH: That the parties to these presents each in consideration of the undertakings, promises and agreements on the part of the other

herein contained, have undertaken, promised and agreed, and do hereby undertake, promise and agree, the party of the first part for itself, its successors and assigns and the parties of the second part for their heirs, executors, administrators and assigns as follows:

Article 1. In consideration of the payments to be made as hereinafter provided and of the performance by the party of the first part of all of the matters and things by it to be performed as herein provided, the Contractor, party of the second part, agrees, at his own sole cost and expense, to perform all the labor and services, and furnish all the material, plant and equipment necessary to complete, and to compete in good, substantial, workmanlike, and approved manner, within the time herein specified, and in accordance with the terms, conditions and provisions of this contract, and of the instructions, orders and directions of the Engineer, made in [115] accordance with this contract, the following work to-wit; the construction of a gravity type, concrete or cyclopean masonry dam across the Arroyo Seco, and appurtenant structures at the same place known as Devil's Gate.

Article 2. The Contractor further agrees to begin work within thirty (30) days from the date of execution hereof, and to prosecute the same with speed and diligence so as to insure the completion of the work on or before the 19th day of January, 1920.

The maintenance of the required rate of progress,

on this contract and its completion within the specified time, being to an exceptional degree necessary for the complete success of the work on account of the urgent need for relief, and the very serious disadvantage of a delayed construction period, the contractor agrees to take all precautions in preparation and management which may be required by this contract: Provided the contractor shall not be held responsible for delays caused by strikes, riots or acts of God, or acts of the public enemy.

Article 3. The Los Angeles County Flood Control District, party of the first part, agrees to pay, and the contractor, party of the second part, agrees to accept as full compensation, satisfaction and discharge, for all work done and all materials furnished, whether mentioned in the following schedule or not, and for each and every matter, thing or act performed, furnished or suffered, in full and complete performance and completion of the work of this contract in accordance with the terms, conditions, and provisions thereof and of the instructions, orders and directions of the Chief Engineer thereunder, except extra work which shall be paid for as provided in Section of the specifications entitled "Extra Work" and except as in this contract otherwise specifically provided, a sum equal to the amount of the actual work done and materials furnished, as determined by the Chief Engineer, under each item in the following schedule multiplied by the unit price applicable to each item, as set forth in the following schedule, to-wit:

SCHEDULE OF UNIT PRICES AND ESTIMATED QUANTITIES:

Item 1, for 3,000 cubic yards dry earth excavation at the unit price of $1.80 per cubic yard. Total Amount .....$ 5,400.00

Item 2, for 2,000 cubic yards wet earth excavation at the unit price of $1.90 per cubic yard. Total Amount .....$ 3,600.00

Item 3, for 3,000 cubic yards dry solid rock excavation at the unit price of $3.85 per cubic yard. Total Amount .....$ 11,550.00

Item 4, for 3,000 cubic yards wet solid rock excavation at the unit price of $3.85 per cubic yard. Total Amount .....$ 11,550.00

[116]

Item 5, for 28,350 cubic yards concrete which may have large stones embedded at the unit price of $2.55 per cubic yard. Total Amount .....$ 72,292.50

Item 6, for 4,000 cubic yards plain concrete at the unit price of $2.55 per cubic yard. Total Amount .....$ 10,200.00

Item 7, for 1,000 cubic yards re-enforced concrete at the unit

price of $11.60 per cubic yard. Total Amount.....$ 11,600.00

Item 8, for 620 lineal feet precast hand rail, lamp posts, etc., at the unit price of $7.50 per lineal foot. Total Amount .....$ 620.00

Item 9, for 620 lineal feet of 2″ fibre conduit with No. 6 copper wire pulled into conduit and lamp posts set in place at the unit price of $1.00 per lineal foot. Total Amount.....$ 620.00

Item 10, for 300 lineal feet of concrete lined tunnel at the unit price of $71.00 per foot. Total Amount .....$ 21,300.00

Item 11, for 10,000 pounds steel re-enforcement at the unit price of $.06 per pound. Total Amount .....$ 600.00

Item 12, for 6,300 square foot road surfacing at the unit price of $.15 per square foot. Total Amount .....$ 945.00

Item 13, for 3,000 lineal feet 2½″ drilled grout holes at the unit price of $5.00 per lineal foot. Total Amount .....$ 15,000.00

Item 14, for the work of placing 1000 sacks cement in grouting at the unit price of $.60 per sack. Total Amount .....$ 600.00

Item 15, for extra work the amount specified in Section 19 of the general conditions and definitions.

Total amount of this bid is.$169,907.50

Article 4. It is expressly stipulated, understood and agreed by and between the respective parties hereto, that from the nature of the case, and because of the public character of the work to be performed hereunder, it would be impracticable and extremely difficult to fix the actual damage sustained by the party of the first part by reason of a breach of this contract, or of failure to complete the whole work to be done under this contract within the [117] time herein specified, including such extensions as may be granted. For this reason the parties hereby stipulate and agree that in case of default in completing the whole work to be done under this contract within the time herein specified, including such extensions as may be granted, the contractor hereby agrees to pay to the party of the first part as liquidated damages, and not by way of penalty or forfeiture, the following:

FIRST: A sum sufficient to compensate said first party for the cost of expense of employing engineer, inspectors, and employees to the extent that their services are reasonably required during this period of default by the work of this contract.

SECOND: The sum of Twenty-five Dollars per day for each day that the completion of the whole work under this contract is delayed.

The party of the first part shall have the right to deduct such liquidated damages from any moneys due or to become due the contractor, and the amount, if any still owing after such deduction, shall be paid on demand by the contractor or the contractor's Surety. Payment of such liquidated damages shall not relieve the contractor or the contractor's Surety for any other obligations under this contract.

Article 5. If the Contractor shall fail to comply with any of the terms, conditions, provisions, or stipulations of this contract according to the true intent and meaning thereof, then the party of the first part may avail itself of any or all remedies provided in that behalf in the Contract, and shall have the right to and power to proceed in accordance with the provisions thereof.

Article 6. It is hereby agreed by the parties to this Agreement that the following exhibits attached hereto and made parts thereof shall constitute integral parts of said Agreement, the whole to be collectively *know* and referred to as the Contract:

Advertisement .....EXHIBIT "A."
Agreement .....EXHIBIT "B."
Bond .....EXHIBIT "C."
General Conditions and
Definitions .....EXHIBIT "D."
Maps .....EXHIBIT "E."
Detailed Specifications ..EXHIBIT "F."
Proposal .....EXHIBIT "S."

Article 7. It is expressly stipulated and agreed

that the minimum compensation for labor upon said work shall be two ($2.00) Dollars per day.

It is further expressly stipulated and agreed that no Chinese labor shall be employed upon said work, and that eight hours labor shall constitute a day's work, and that no laborer, workman or mechanic in the employ, or under the direction or control of the Contractor, or of any sub-contractors doing or contracting to do the work or any part of the work contemplated by this agreement [118] shall be required or permitted to labor more than eight hours during any one calendar day, except in cases of extraordinary emergency caused by fire, flood or danger to life or property.

And, it is further stipulated and agreed that the said Contractor shall forfeit as a penalty to Los Angeles County Flood Control District the sum of Ten ($10.00) Dollars for each laborer, workman or mechanic employed in the execution of this contract by the Contractor or by any subcontractor upon said work, for each calendar year during which such laborer, workman or mechanic is required or permitted to labor more than eight hours, and the officer of said Los Angeles County Flood Control District authorized to pay said Contractor moneys becoming due to said Contractor under this agreement shall, when making payments of money thus due, withhold and retain therefrom all sums and amounts which shall have been forfeited as above stipulated and in accordance with the provisions of Section 653c of the Penal Code of the State of California.

IN WITNESS WHEREOF the said Los Angeles County Flood Control District has, by order of its Board of Supervisors, caused these presents to be subscribed by the Chairman of said Board of Supervisors, and the seal of said District to be affixed and attested by the Clerk, and the said Contractor has subscribed his name thereto the day and year first above written.

Executed in Duplicate.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

_____,

Chairman of Board of Supervisors of Said District.

_____,

Contractor.

Attest: A. M. McPHERRON,
Chief Clerk.

EXHIBIT "D."

GENERAL CONDITIONS AND DEFINITIONS.

The word Engineer *of* Chief Engineer shall mean the Chief Engineer of Los Angeles County Flood Control District, or his properly authorized agents, engineers, assistants, inspectors and superintendents, acting severally within the scope of the particular duties entrusted to them.

The word Contractor or the expressions Party of the Second Part or Second Party shall mean the person, persons, partnership or corporation entering into this Contract for the performance of the work required by it, and the legal representa-

tives of said party or the agent appointed to act for said party in the performance of the work.

[119] The words Contract Price shall mean either the unit price or the unit prices named in the Agreement, or the Total of all payments under the Contract at the unit price or unit prices, as the case may be.

Wherever in this Contract or in the Official Plan the words Directed, Required, Permitted, Ordered, Instructed, Designated, Considered Necessary, Prescribed, or words of like importance are used, it shall be understood that the directions, requirements, permission, order, instruction, designation, or prescription, etc., of the Chief Engineer is intended; and similarly, the words Approved, Acceptable, Satisfactory, or words of like import, shall mean approved by, or acceptable or satisfactory to, the Chief Engineer, unless another meaning is plainly intended.

Time and Order of Completion. The Contractor agrees that the work shall be commenced and carried on at such points, and in such order of precedence, and at such times and seasons as may be directed by the Engineer. The Engineer shall have the right to have the work discontinued, for such time as may be necessary, in whole or in part, should the condition of weather, or of flood, or other contingency make it desirable so to do, in order that the work shall be well and properly executed. Extension of time may be granted the Contractor for discontinuance of work so required, as provided in Section entitled "Extension of Time."

To Direct Work. It is mutually agreed that the Engineer shall have the right to direct the manner in which all work under this Contract is to be conducted, in so far as may be necessary to secure the safe and proper progress and quality of the work.

To Determine Quantities and Measurements. The Engineer shall make all measurements, and determine all quantities and amounts of work and materials done or furnished under this Contract.

It is stipulated and agreed that the planimeter shall be considered an instrument of precision adapted to the measurement of all areas.

Items of Work. The division into Items has been made to enable the Contractor to bid on the different portions of the work in accordance with his estimate of their unit cost, so that in the event of any increase or decrease in the quantities of any particular kind of work, the actual quantities executed may be paid for at the Unit Price for that particular kind of work.

Changes and Alterations. The Board reserves the right to make such alterations, eliminations, and additions as it may elect in the line, grade, form, location, dimensions, plan or material of the work herein contemplated, or any part thereof, either before or after the commencement of construction.

If such changes diminish the quantity of work to be done, they shall not constitute a claim for damages or anticipated profits on [120] the work that may be dispensed with; provided, that if the said first party shall make such changes or altera-

tions as shall make useless any work already done or material already furnished or used in said work, the Engineer shall make reasonable allowance therefor, which action shall be binding on both parties. If they increase the amount of work such increase shall be paid for according to the quantities actually done, and at the Unit Prices established for such work under this Contract. Extra Work shall be paid for as hereinafter provided.

Extra Work. If, during the performance of this Contract, it shall become necessary or desirable for the proper completion of the work hereunder to order additional work done or materials furnished, whether mentioned herein or indicated on the Drawings or not, which in the opinion of the Engineer are not susceptible of classification under the Schedule of Unit Prices, the Contractor shall, if ordered in writing by the Engineer, do and perform such work and furnish such materials; and he shall be paid therefor the actual and necessary net cost, as determined by the Engineer, plus 15 per cent thereof. Such actual net cost shall cover all labor and materials necessary for the performance of the extra work, including any extraordinary expenses incurred directly on account thereof, the wages of foremen, and expense attached to Contractor's liability insurance covering the labor so employed; but in making payment to the Contractor for such extra work, no allowance shall be made for overhead charges, general superintendence, general expenses, contingencies, or use and depreciation of, and wear and tear upon the plant.

As condition precedent to the right to receive any money for extra work and material furnished under this Contract, the Contractor shall deliver to the Board, before the 15th day of the month following a month in which any such extra work has been done or extra materials furnished, an itemized bill of the cost of such materials or work, and unless it is so filed the claim for *extra shall* be deemed waived.

Progress Estimates. In order to assist the Contractor to *per*secute the work advantageously, the Engineer shall, from time to time, during the active progress of the work approximately once a month, make a determination of all work done and materials incorporated in the work by the Contractor up to that time, and a progress estimate, in writing, showing: the value of such work and materials under and according to the terms of this Contract; and other amounts due the Contractor; all deductions made in accordance with the provisions of the Contract; then, from the balance, a deduction of 25 per cent of such balance, or a larger percentage, if in the opinion of the Engineer the protection of the District so requires; then, from the remainder, a deduction of the total amount of all previous payment; and finally, the amount due the Contractor under such progress estimate. Such progress estimates shall not be required to be made by strict measurements, but they may be made either by measurement or by approximation.

[121] In case work is merely suspended or in case only unimportant progress is being made, the

Engineer may, at his discretion, make progress estimates at greater intervals than once a month.

Upon such progress estimate being made and certified in writing to the Board, the District shall, within 10 days after the date of the estimate, pay to the Contractor the amount due him under such estimate; provided, however, that the District may at all times reserve and retain from such amount, in addition to the 25 percent heretofore mentioned, any sum or sums which, by the terms hereof, or of any law of the State of California, it is or may be authorized or required to reserve or retain.

Final Payment. Whenever, in the opinion of the Engineer, the work covered by this Contract has been completed, he shall so certify in writing to the Board, and shall submit a final estimate showing the total amount of work done by the Contractor, and its value under and according to the terms of this Contract; any other amounts due the Contractor; all deductions made in accordance with the provisions of the Contract; the total of all previous payments; and the amount due the Contractor under such final estimate. At the expiration of 25 days after date of the acceptance of the work by the Board, the District shall pay to the Contractor the amount due him on the final estimate. Provided, however, that before he shall be entitled to payment of such amount, the Contractor shall execute and file with the Board a release, in proper form, of all claims against the District on account of this Contract, except for

(Testimony of H. Stanley Bent.)

the Contractor's equity in the amounts kept or retained under the terms of this Contract; and except for the interest, if any due on the final estimate, as provided hereinafter; and except any other claims that have theretofore been filed in accordance with the provisions of the Contract, which are listed and itemized in detail in a statement attached to and made a part of such release, giving reasons for, nature of, and amount of each claim so listed. All prior estimates upon which payment may have been made, shall be suspended by the final estimate."

The method pursued in the performance of the contract and the settlements made for work under it are, briefly: We proceed with the work and are given at the end of each calendar month a statement by the county's engineer indicating the amount of work we have done under the contract, and on or about the 10th of the month we receive payment for 75 per cent of the work reported done in the previous calendar month. The document before me is a correct summary of the work done under the Devil's Gate Dam Contract. There was offered and received in evidence a summary of the work done under the Devil's Gate Dam Contract, which was marked Petitioner's [122] Exhibit No. 2, a true copy thereof being in words and figures as follows, to wit:

PETITIONER'S EXHIBIT No. 2.

BENT BROTHERS (PARTNERSHIP).

CONTRACT FOR DEVIL'S GATE DAM.

COVERS EXCAVATION OF EARTH AND LOOSE ROCK, SOLID ROCK, TUNNEL, PLACING OF CONCRETE FORMS, REINFORCEMENT AND POURING CONCRETE.

Principal—Los Angeles County Flood Control.
Date—March 19, 1919.

The Books show that the work was started in April, 1919, and completed in September, 1920.

INCOME SUMMARY OF DEVIL'S GATE DAM JOB FOR 1919 and 1920.

		DONE IN 1919.		DONE IN 1920.	
		UNITS.	VALUE.	UNITS.	VALUE.
Excavation—Earth.....	$1.80	4,544 c. y.	$8,179.20	1,301 c. y.	$2,342.52
Excavation—Rock.....	3.85	10,469 c. y.	38,690.65	966 c. y.	5,334.10
Concrete.....(	2.55)				
	(11.60)	21,155.17	55,852.62	12,091.74	50,885.84
Reinforcement (per lb.)..	.06	50,000#	3,000.00	182,156 #	10,929.36

	DONE IN 1919.		DONE IN 1920.	
	UNITS.	VALUE.	UNITS.	VALUE.
Tunnel	409.25 ft.	$31,102.50	82.25 ft.	$3,865.00
Miscellaneous		3,538.00		8,482.03
		$140,362.97		$81,838.85
		81,838.85		
Total Work Done		$222,201.82		

(Testimony of H. Stanley Bent.)

[123] Thereupon, there was offered and received in evidence a summary identified by the witness of the work done under the Huntington Park Reservoir contract, which was marked Petitioner's Exhibit No. 3. A true copy thereof is in words and figures as follows, to wit:

PETITIONER'S EXHIBIT No. 3.

BENT BROTHERS (PARTNERSHIP).

HUNTINGTON PARK RESERVOIR.

Work done in 1920	$18,107.27
Work done in 1921	4,097.89
Total	$22,205.16

Job started September, 1920, completed February, 1921.

This was a Force Account (Cost plus) job.

The document before me is a summary of the work done under the contract designated Rodale (Rodeo) Drain Job and is a correct statement thereof. That was a contract for the laying of a storm sewer and the work started in November, 1920, and was finished in March, 1921.

There was offered and received in evidence a summary of the work done under a contract designated as Rodeo (erroneously spelled Rodale) Drain in the years 1920 and 1921, which was marked Petitioner's Exhibit No. 4, a true copy thereof being in words and figures as follows, to wit:

(Testimony of H. Stanley Bent.)

PETITIONER'S EXHIBIT No. 4.

BENT BROTHERS (PARTNERSHIP).

RODEO DRAIN JOB.

Work done in 1920	$19,955.60
Work done in 1921	9,259.90
Total	$29,215.50

This was a job done under contract dated October 28, 1920, and was for the laying of a storm sewer. This work was started November, 1920, and finished in March, 1921.

[124] Q. I show you another summary made in connection with the contract denominated Newport Beach Sewer, covering years 1921 and 1922, and ask you if that is a correct summary of the work done under that contract during the period shown there? A. Yes.

Q. And that particular work upon that particular contract which involved the construction of a sewer at Newport Beach started in June, 1921, and was completed June, 1922; is that correct?

A. Yes.

Mr. PATROSSO.—I now offer this as Petitioner's Exhibit No. 6.

Mr. MATHER.—That is objected to because it involves the years 1921 and 1922, and Stanley Bent involves 1920.

Mr. PATROSSO.—No; it involves 1922.

Mr. MATHER.—H. Stanley?

Mr. PATROSSO.—Yes.

Mr. MATHER.—The deficiency for that year is limited to 1920.

Mr. PATROSSO.—Page 2 of the petition.

Mr. MATHER.—Yes, but I am looking at the deficiency letter and it discloses the deficiency in tax amounting to $12.73 for the year 1920 and overassessments for the year 1921 and 1922, so that our position is the only year before the Board is 1920. (Tr. 54.)

Mr. PATROSSO.—That is the matter that we were discussing in part this morning as to the question of jurisdiction.

The MEMBER.—That was the question of jurisdiction. Well, I suppose it comes to the same thing. The petition on its face states that "the deficiency letter, a copy of which is attached, discloses a deficiency only for the year 1920. That is erroneous. That letter should have included the year 1922." Of course that is not for the petitioner to say what it should have included. The basis of the whole proceeding is what the respondent calls upon the petitioner to do; he called upon him to pay a deficiency only for 1920. I think it is true that the year 1920 is the only year in issue. 1922 is not properly before the Board.

Mr. PATROSSO.—In that connection, your Honor, it is true that the allegations contained in the petition cannot affect the letter itself. Our position and it is the only position we can take and meet it squarely so that it is in effect, the letter is, in effect, a deficiency for 1922, for the reasons which I already stated this morning, and which is

(Testimony of H. Stanley Bent.)

unnecessary to repeat here other than to add that in that connection there was filed a claim for abatement, a refund claim of one-fourth installment, a refund, with the Commissioner for that year 1922 on behalf of the petitioner, and in the case of H. Stanley Bent, the witness who is now on the stand, which was disposed of, considered by the Commissioner and disposed of in the Communication in connection with the admitted deficiency assessed for the year 1920, and the redetermination at least for the taxable year 1922.

[125] The MEMBER.—The disposition of the claim in abatement was not made in the notice of Deficiency attached to the petition so that this is not a case under 274, nor a case under 283, or whatever it is.

Mr. PATROSSO.—I think it was made in the revenue agent's report, which is attached to the petition. (Tr. 55, 56.)

The MEMBER.—I think 1922 is not properly in issue, if that is the only ground on which this exhibit is offered, the objection is well taken and I will sustain it.

Mr. PATROSSO.—That is our only contention in that regard, our position is, as I stated this morning, that it is in effect a deficiency for the reason there stated, so that it is the last one that is the one that is rejected.

The MEMBER.—Objection sustained, and you may have an exception.

The WITNESS.—(Resuming.) The document

before me is a correct summary of the work done under the contract designated as San Dimas Dam, which was performed in 1920, 1921 and 1922. The work thereunder started in November, 1920, and was completed in June, 1922.

Mr. PATROSSO.—I offer in evidence as Petitioner's Exhibit 6.

Mr. MATHER.—For the years 1921 and 1922 I object but there is no objection for 1920.

The MEMBER.—You have the same objection that you heretofore made.

Mr. MATHER.—Yes.

The MEMBER.—Sustained as to 1921 and 1922. Overruled as to 1920.

Mr. PATROSSO.—My only purpose is to show the completed work, how it was spread over that period of time.

Said document so offered and received in evidence was thereupon marked Petitioner's Exhibit No. 6, and made a part of this record, a true copy thereof being in words and figures as follows, to wit:

[126] PETITIONER'S EXHIBIT No. 6.

BENT BROTHERS (PARTNERSHIP).

SAN DIMAS DAM.

This work was for the construction of a concrete dam for the Los Angeles County Flood Control.

Contract was dated September 20, 1920.

The books show that the work was started in October, 1920, and completed in June, 1922.

Work done in 1920	$ 9,464.10
Work done in 1921	273,390.45
Work done in 1922	80,982.60
Total Work done	$363,837.15

In connection with the summaries that have been introduced in evidence for work performed under contracts by Bent Brothers during 1920, the work in those cases was done under contracts substantially similar to the contract for the Devil's Gate Dam which was introduced in evidence in this cause and marked Exhibit No. 1.

There was offered and received in evidence the Partnership return of Bent Brothers for the calendar year 1920, which was marked Petitioner's Exhibit No. 7. So much thereof as is material and necessary to the determination of the assignments or error set out by the Petitioner in his petition for review, is as follows:

[127] PETITIONER'S EXHIBIT No. 7.

FORM 1065—UNITED STATES INTERNAL REVENUE SERVICE.

Partnership Return of Income for the Calendar Year 1920.

BENT BROTHERS,
825 Central Bldg.,
Los Angeles, California.

Kind of Business—Contracting. Partnership.

SCHEDULE "A"—Income to be Accounted for by Members.

Gross Income from Operations other than trading (from Schedule A–3)	$79,397.90
Interest on Liberty Bonds	270.00
Total	$79,667.90

DEDUCTIONS.

Interest	$6,692.05	
Taxes other than Federal Income	233.14	
Debts, worthless and charged off	23,739.20	
(Schedule A–18) Total		$30,664.89
Difference		$49,003.01
Losses sustained not compensated for by insurance or otherwise (Schedule A–24)		14,274.89
Net income to be accounted for members		$34,728.12

SCHEDULE "C"—Members Share of Income.

Name	Share	Liberty Bond Interest	Other Income
Arthur S. Bent	⅔	$180.00	$22.972.08
H. Stanley Bent	⅓	90.00	11,486.04
Totals		$270.00	$34,458.12

SCHEDULE A–3.

Union Oil Company Reservoir	$59.47
Henrietta Pipe Line	4,035.70
Boulder, Colo. Pipe Line	33.59
Richgrove Pipe Job	25.00
Devil's Gate Dam	26,117.39
El Segundo Stacks	4,407.07
Sundry Equipment Rentals	2,449.86
Glendora Reservoirs	2,406.17
Gibraltar Dam	6,142.42
Lancaster Pipe Line	1,690.30
Los Alamitos Pipe Line	10,946.21
Moapa, Nevada, Waterline	1,652.06
Sub-total (carried forward)	$59,965.24

[128] SCHEDULE A–3 (Continued).

Sub-total (brought forward)	$59,965.24
Naval Base Pipe	3,016.23
Riverside Tower	2,462.68
Union Oil 30″ Pipe	1,343.24
Hall Ditch	410.17
Del Mar Ditch	2,340.98
W. J. Hole Ditch	1,948.47
El Segundo Pit	7,947.39
Taxes	233.14
Total	$79,667.90
Less Interest on Government Bonds	270.00
	$79,397.90

(Testimony of H. Stanley Bent.)

SCHEDULE A–18.

Account Receivable on Truck Sold....	$ 400.00
Marin Munic Water District	2,041.41
Dr. Bryson—Pipe	82.00
E. D. Thompson	23.37
San Luis Obispo Pipe Account	255.16
Jas. Kennedy	16,087.56
Tejunga Water Company	3,699.70
Tucson Assessments	1,150.00
Total	$23,739.20

SCHEDULE A–24.

El Segundo Reservoir #5	$ 5,067.70
Oklahoma Pipe Job	8,859.61
Seal Joint	213.00
La Habra Pipe Job	134.58
Total	$14,274.89

Cross-examination.

I originally became a partner in Bent Brothers with less than a half interest, and about 1916 I became half partner. Bent Brothers continued as a partnership until it was incorporated in 1923, at which time our wives became interested, and one outside party, in order to give the proper number in the corporation. The corporation was a continuation of the old partnership. The same method of bookkeeping was pursued from 1916 to 1923.

[129] TESTIMONY OF WILBUR ATKINSON, FOR PETITIONER.

WILBUR ATKINSON, having been first duly sworn as a witness on behalf of the petitioner, testified as follows:

Direct Examination.

I was connected with the partnership of Bent Brothers prior to and during the years 1920 and 1921 in charge of the office and the books. During the year 1920 the partnership of Bent Brothers was engaged in the performance of the work known as Devil's Gate Dam. The book before me is the book of accounts of the Devil's Gate Dam.

The entries contained in that book were made under my supervision. The method pursued in making entries in reference to the contract known as Devil's Gate Dam, was: Monthly on receipt of an estimate from the county engineer for all of the work done during the calendar month, the amount of the estimate was entered on this record. The county was charged with it. The job was credited with the full amount of the estimate for the month.

During 1920 there was in progress in addition to the Devil's Gate Dam job other undertakings known as Huntington Park Reservoir, Rodeo Drain and San Dimas Dam. I am familiar with the summaries that have been introduced in evidence. I checked them with the records and they correctly represent the amount of work done during those years under those contracts in accordance with the method I have explained.

(Testimony of Wilbur Atkinson.)

The books were not closed with reference to the Devil's Gate Dam job at the end of each calendar year during the time that it was in progress. Referring to the book before me, being the book which I have already identified as our book in connection with Devil's Gate Dam job, and referring particularly to the items in [130] the account entitled "Accounts Payable," those items were entered regularly through the year until the end of the year; the amount incurred in December, that would have been paid in January, we put in as an account payable so that the full cost of the year would be reflected in the year's work. In keeping the books in connection with Devil's Gate Dam job the cost and expense of doing the work was entered monthly throughout the period that the work was in progress.

Under the Devil's Gate contract there was a provision for holding back a portion of each estimate and that was reflected in a retention account, an income account. An engineer's estimate was rendered for the full work done during a particular month. This estimate was received two or three days after the end of the month; at that time an entry was made in the journal charging the customer or municipality for the full amount of the estimate and crediting Job Account for 75% and Retention Account for the balance.

(By the MEMBER.)

Q. What do you mean by crediting in this account? Do you have a ledger account here?

A. No.

(Testimony of Wilbur Atkinson.)

Q. How do you work it?

A. Charge against a customer.

Q. I do not understand it yet. What is the title of the account, and what entries do you make and where do you make them? Do you make a journal entry? A. Yes, a charge.

Q. When you make a journal entry, when an estimate is made by the engineer at the end of the month, he makes an estimate of 100 per cent of the amount of the work during that month?

A. Yes.

Q. And then he pays you or the municipality pays you 75 per cent of the amount; is that right?

A. Pays the following month 75 per cent in cash.

Q. So that on the 31st of January you get the estimate of the amount to be paid?

A. The amount owing by the county.

Q. And it is 100 per cent of that amount that your estimate covers? [131] A. Yes.

Q. What entry do you make and where do you make it? What entry do you make and where do you make it when you get that estimate?

A. We credit during the following month we receive the cash and credit the county with the cash received—

Q. I am talking about the entry which you make at the time the engineer's estimate is received before any payment is made; I understand you are talking about the 31st of January for the work that has been done during the month of January.

A. Yes.

(Testimony of Wilbur Atkinson.)

Q. The engineer makes an estimate on January 31 of 100 per cent of the amount to which you are entitled for that work? A. Yes.

Q. Is that right? A. Yes.

Q. On the 31st of January, what entry do you make in respect of that estimate and where do you make it?

A. We file the engineer's estimate as an original entry and that is the record of the charge to the customer or the county.

Q. Don't you make any record in the book of account?

A. Not monthly. We call the file of estimates a portion of our original books of account, the same as our journal.

Q. What is your book of original entry in respect of all these contracts, your journal? Is that the book of account you enter an amount in?

A. It takes our journal and our file of estimates to make our original entries.

Q. I am talking about the book. What is the first book of original entry that your system has, a journal? A. I would say the estimate sheet.

Q. A sheet is not a book. A. We keep a file.

Q. What is the first book?

A. The first book after the estimate sheet is the journal.

[132] Q. Does your journal have debits and credits? A. Yes.

Q. Is it a double entry journal? A. Yes.

Q. After the engineer makes his first estimate

(Testimony of Wilbur Atkinson.)

on the 31st of January about the work of the month of January, when do you make your first entry in a book of account? You have got the estimate and filed it. A. As soon as we get that estimate.

Q. When do you make that entry?

A. As soon as we get the itemized estimate from the county.

Q. That is on the 31st of January?

A. We never get it in on the 31st. We don't get it until two or three days from that, but we enter it up for the month.

Q. When you get it two or three days after the 31st of January, do you make an entry in your journal? A. Yes.

Q. What do you debit in your journal?

A. Our customer.

Q. The customer is the municipality for whom the work is being done?

A. That would be in this case.

Q. What do you credit? A. Job account.

Q. So that at that time making no record of any cash received? A. No, it is not a cash entry.

Q. You charge the customer's account and you credit the job account?

A. Yes; that is the idea. (Tr. 70 to 74.)

I have before me the Journal of Devil's Gate Dam and the entry for work done during January, 1920, is a charge to Los Angeles County of $10,485.97 and a credit to Dam Account of $10,485.97 and a charge to Los Angeles County of $3,495.33 and a credit to Retention Account of $3,495.33.

(Testimony of Wilbur Atkinson.)

The same practice was followed throughout the period work on the Devil's Gate Dam was in progress. Such entry had no relation to the cash actually received; at the time the entry is made no money has been received on that particular estimate.

[133] The book now handed me is the general ledger of Bent Brothers and this other book is a transfer of the general ledger. The ledger and transfer ledger contain entries with reference to the work done during the year 1920 on the Huntington Park Reservoir; the Rodeo Drain and San Dimas Dam. The same practice was followed in connection with entries on these several jobs of construction work as was followed in connection with Devil's Gate Dam. The cost of various enterprises was entered upon the books monthly as accrued. The general cost was put in monthly and at the end of the year a portion of the overhead that accrued in the general office was put into each job to give the full cost of the job for the year. This was done whether the work on that particular job was completed or not at the end of the year.

Referring to Petitioner's Exhibit No. 7 in this cause which is the income tax return for the year 1920 for Bent Brothers, a Partnership, and the summary introduced in evidence of the work done on Huntington Park Reservoir showing that in the year 1920 on that particular work there was done $18,107.27 and in 1921 $4,097.89, no part of said sum of $18,107.27 which that summary shows was done in the year 1920 was included in the 1920 re-

(Testimony of Wilbur Atkinson.)

turn. That was included in the year the job was completed.

With reference to Rodeo Drain and the summary of the work done thereunder, which shows that during the year 1920 there was done upon that particular job work in the sum of $19,955.60 and in 1921 $9,259.90, no part of that $19,955.60 was included in the return for 1920. It was included in the year the job was completed.

With reference to the San Dimas Job the summary of which was introduced in evidence in this cause shows during 1920 there was [134] performed work in the sum of $9,464.10 and in the years 1921 $273,390.45 and 1922 $80,982.60. No part of the amount for work done in 1920 was included in the 1920 return.

The Devil's Gate Dam was completed in the year 1920 and in the return for the Partnership of Bent Brothers for 1920 the total amount of all the work done under that contract in that year and the preceding year was returned, and the $81,838.85 which is shown by the summary in evidence as done in the year 1920 was included with all the work of the preceding year.

Cross-examination.

The item of $81,838.85 in connection with Devil's Gate Dam for the year 1920 is shown in the ledger of the job which is a portion of the general ledger of the partnership of Bent Brothers. In this particular portion of the ledger there is no record of the Huntington Park Reservoir job, the Rodeo

(Testimony of Wilbur Atkinson.)

Drain job or the San Dimas Dam job. The record with reference to the jobs last mentioned are found in other portions of the general ledger.

The record to which I now refer is the account of the Huntington Park Reservoir and is a portion of the general ledger transfer. The transfer ledger consists of accounts which are closed and taken out of the general ledger. I call the particular portion of the book to which you direct my attention a part of the general ledger for the reason that it covers one job. It was too bulky and we kept it under a separate cover. We did this in two or three other instances, none of which are involved here except Devil's Gate Dam. The accounts for the other jobs were kept generally in the same way as Devil's Gate Dam job. Similar or corresponding entries and accounts with reference to the other jobs are found in the general ledger. [135] I now refer to the account covering Huntington Park Reservoir. October 20, $3,997.61, charged to the City of Huntington Park which refers to estimate received. The entry in April designated C–44 refers to cash received from Huntington Park. This entry was made when we received the cash, because that was a force account job. All the cash that we received on that job during the year 1920 is reflected in this statement from October 20, 1920, to December 23, 1920. As to how we treated that in our books, I will say that we did not do a thing with it until the end of the job. That was the only book record we had of that job. What I have said

(Testimony of Wilbur Atkinson.)

is also true of the Rodeo Drain job and the San Dimas Dam job.

The income received from the San Dimas Dam job was reported at the end of the job in 1922. It was our custom to report income when the job was completed. (Tr. 87.) No part of it was returned for the year 1920 or for the year 1921, but was reported in the 1922 return. (Tr. 88.) None of these jobs that I have just referred to was treated or carried as much in detail as we did the Devil's Gate job.

I did not make any of the income tax returns for Bent Brothers but I saw the making of them all. I think that Bent Brothers most likely relied upon my assurance that the figures were correct before they signed them. I think Mr. Teasley made some of the returns prior to 1923, possibly in 1920, but I cannot say by whom the returns were made by an inspection thereof. They are not in my handwriting. If Mr. Teasley prepared the returns he got the figures from our office and I probably went over the figures with him. Mr. Teasley is not an officer of our company or a regular employee thereof. Any figures that Mr. Teasley secured he got from me or the books. Mr. Teasley had full access to our books just as I did, but I do not, however, know if this was so in 1920.

[136] Referring to our ledger and the items of cost on the Huntington Park Job, the witness testified as follows:

Q. What cost items have you entered there?

A. You mean in amount?

(Testimony of Wilbur Atkinson.)

Q. No, items.

A. Full cost of the job in 1920—full cost of the job for 1920.

Q. When was that entered?

A. Monthly as expenses grew, except overhead which was entered at the end of the year.

Mr. MATHER.—I ask that the answer be stricken, and you answer the question. When was that entered in the ledger.

The WITNESS.—December 31.

(By Mr. MATHER.)

Q. What year? A. 1920. (Tr. 91.)

The reference in the little column to the side to which you direct my attention is the journal. That account is in the corporation ledger at the office. The entry that I have just testified to and pointed to reads as follows:

"Donations $45.00, expenses $3,946.43, might have been $1,399.13." That is where we are expecting to get jobs and have expenditures, if we don't get the job it goes into "Overhead—Salary $13,751.83." That is entered in here as December 31, 1920. As to where we have prorated or distributed that expense, a portion of it is distributed to the Huntington Park Reservoir and the different jobs that we were operating during that year. Monthly, every expenditure was entered that went into the Huntington Park job. At the end of the year we prorated the overhead to the job on the proportion it bore to the gross expenditure in the year.

We have a profit and loss account which I now

(Testimony of Wilbur Atkinson.)

show you. That account shows $26,117.39 gain on Devil's Gate Dam.

Q. What did that show at the end of the year 1919? Can you tell from your books?

A. I figured it up from the books. I would have to make the calculation.

Q. There is no way from your books, any of them that you can tell?

A. Not to look at a certain line and tell it, no, sir.

We did not close our books with reference to any of these contracts under dispute so as to show the profit on them at any particular period prior to completion. This return of 1920 was made on [137] the completed contract basis, and that would be in accordance with our books.

The partnership of Bent Brothers was incorporated May, 1923, as of January 1, 1923. No audit of the books was made by any outside auditor at the time of the incorporation. The books were just continued the same as before except for the addition of a few more accounts because of the corporation. The same ledger was carried.

The books were not closed on these several jobs at the close of the year and the returns made accordingly because it had not been the custom. The principal reason was that prior to this time Bent Brothers' jobs were completed within a year.

Redirect Examination.

In connection with the summaries that are in evidence here with respect to the various jobs under consideration, the Devil's Gate Dam and San

(Testimony of Wilbur Atkinson.)

Dimas Dam, etc., and jobs that we have been referring to, all the figures that are in those summaries were taken from our records which showed the amount of work done during each year that is represented on each particular summary. I figured those things through after they were made up from our records and I found that was the annual amount to each job. I did not have to resort to anything except our books and estimate sheets to get the totals included in those various summaries that are in evidence in this cause.

In the distribution of this overhead to which my attention was directed on cross-examination, we distributed that overhead at the end of each calendar year over all of the jobs in progress during that year, but in making our income tax returns we did not deduct any of that prorated overhead for that calendar year upon any job that was not closed or completed during that year.

[138] The Devil's Gate Dam accounts were kept in a separate ledger because of the fact that it was a large contract. This was also true of some of our other large construction contracts.

Subsequent to the incorporation of the partnership in May, 1923, the books were just carried on as before but after that time we closed all the accounts at the end of each calendar year. Aside from that we followed the same accounting practice as before. With the inception of the corporation we began to make our returns upon a calendar year basis, charging ourselves with all the income ac-

(Testimony of Wilbur Atkinson.)

crued during the year, whether the job was completed or not.

Recross-examination.

The expense I testified to on these contracts that were not completed at the end of the year was credited to expense accounts, and charged to the job account and carried through to the next year. It was not charged to profit and loss until the job was completed.

After incorporation the income tax returns were made on the annual basis rather than on the completed contract basis. During the same period the method of keeping the books was not changed but at the end of the year we carried the loss or gain to the job for the year which had not previously been done.

By the MEMBER.—This method of bookkeeping to which you have just testified was the same and consistent with the method which you had employed for years prior to the years in question, except as to the income reporting at the end of the year?

A. The method of accounting which I have described as applying to the year 1920 was in operation when I came with the firm in 1912, and the method of accounting had been consistently the same from 1912 through the year 1922.

[139] Income tax returns were made upon the same basis from the year 1913 through the year 1922. The witness then testified as follows:

Q. Did you make a return for each of the years

(Testimony of Wilbur Atkinson.)

from then on that was similar in method to the one which you made for 1920?

A. Each year, yes, every year there was a profit or loss. We must have reflected one or the other. (Tr. 104–105.)

Our returns each year were on a method different from our books in that we made our returns for each of these years upon a method called completed contracts and we kept our books for each of these several years upon an accrual method, which had nothing to do with completed contracts, and the returns were consistent with each other, and the books were consistent year after year, and each of them was inconsistent with the other or each of them was different from the other. The return did not reflect the earning for the year.

Q. So that the method of accounting regularly employed by this taxpayer from 1912 to 1922 was not a method of reflecting the completed contract income, was it?

A. The reason practically all our contracts were short term, that they did not lap over from year to year, so what was completed was income for the year most of the time.

Q. You mean the income for the year as to most of these years happened to be the same as reflected by the books and as reflected upon the completed contract basis. Is that right?

A. That is the idea.

We first encountered the problem of having a contract which had a duration for more than one year in 1916, 1917 or 1918. It was prior to these

(Testimony of Wilbur Atkinson.)

contracts which we acquired in 1919 that I have been testifying about here.

Our book of account with respect to those contracts having more than a single year's duration which we acquired prior to 1919, we never carried any to the loss and gain account until the job was finally completed. We carried the cost through. Consistently from 1913 onward our method of book accounting was an annual method although our returns were not—not on annual earnings. The returns had been made consistently upon a completed contract basis irrespective of our annual period. When I speak of an annual method in respect of keeping our books, that included the ascertainment of the financial results of our business at the end of the year. Consistently from 1913 to 1922 we undertook a summarization of our accounts on an annual basis both by way of balance sheet and by way of profit and loss statement. We entered an account which was called cash-in-jobs account and any uncompleted job was cash-in-jobs, representing investment.

For the year 1920, at the conclusion of that year, for our own business purposes we prepared a profit and loss statement and carried in our financial statement so much cash-in-jobs as an asset.

[140] The witness then testified as follows:

Q. Now, I am afraid you are getting confused as between a balance sheet and profit and loss statement.

A. The profit and loss statement never reflected the earnings for the year until the job was com-

(Testimony of Wilbur Atkinson.)

pleted during this period in question and prior. (Tr. 108, 109.)

When we prepared a balance sheet, we entered into that statement cash invested in jobs unfinished for a certain amount of money. This amount was found in our books in two accounts; we would have an account of funds received from our customer and an account of the costs up to the time that they were carried in cash invested in jobs account. Those two items took care of those jobs that were unfinished.

If I were to transcribe from our books of 1920 the footings of any of the accounts, the resulting figures would be different from those contained in our returns.

Recross-examination.

They would be different in the matter of the loss and gain not having been entered in the account until the job was closed. Our profit and loss account or our income account shown on this return is not exactly the same as was shown on our ledger or on our books for that period because the loss and gain account reflected the loss and gain for the year outside of unfinished contracts. We did not make our returns on the same basis or method or theory that we kept our books for the reason that the books reflect the cost of jobs uncompleted, the estimates on jobs uncompleted, and the loss and gain account only reflects completed [141] jobs. In that respect our books are different from our

(Testimony of Wilbur Atkinson.)

returns but that refers only to our profit and loss account.

We did not at that time carry income on uncompleted contracts into profit and loss account until they were completed; when they were, then we showed them on our returns. Our returns at that time should have conformed to the loss and gain account, but not to the job accounts. Until we closed our job account we did not show any loss and gain.

Redirect Examination.

In preparing our return of 1920, the partnership return, we went through the books and took the contracts that were completed during that year, ascertained our gross income therefrom, and deducted therefrom the cost or expense of performing the work.

Our return does not reflect only the costs actually incurred during the year 1920, it reflects the costs on the completed jobs in 1920 irrespective of the time when they were incurred. That is true of gross income irrespective of the time it was earned. And to that extent the return does not show the same gross income that was accrued upon the books during that year; nor does it show the same costs or expenditures that were accrued upon the books in that year.

Recross-examination.

By "accrued on the books," I mean with reference to a job not completed during the year; the first cost was set up and the estimates as against

(Testimony of Wilbur Atkinson.)

that cost were set up, but not finally carried to loss [142] and gain account until the job was completed. The expense was reflected in our books at the time that the income or gain was reflected. They were reported at the same time on the completion of the job, but not at the time of the accrual; that is, at the time we carried them to our profit and loss they were shown on our returns.

TESTIMONY OF H. STANLEY BENT, FOR PETITIONER (RECALLED).

H. STANLEY BENT, being recalled as a witness on behalf of petitioner, and having been first duly sworn, testified further as follows:

Redirect Examination.

As I have said, I had charge of the office work in connection with the partnership of Bent Brothers which duties I assumed all through the years following 1910, unless I was actually out in the field on a job. I was more or less to be the head of the office and be familiar with everything there. I had a hand in the installation of the accounting system pursued by Bent Brothers. The suggestions as to convenience and simple methods of handling our accounts were made by both my brother and myself, and that method was followed consistently up through the year 1920. During the early years our business was not very large. Our contracts were comparatively small, were short lived and as a rule were started and completed within a calendar year.

(Testimony of H. Stanley Bent.)

It was rarely that a job went over a longer period than one year, but such jobs were comparatively small and the loss and gain was not of enough consequence to make any material difference in our affairs or in reports, whether it came within the calendar year or not.

Examination by Member.

In the case of a supposed contract which began in November and was completed the following May, we did not make an analysis except [143] for our own information. We wanted to know if we were making or losing money, and we made up figures that satisfied us, but in our statements to our bank and bonding company and financial statements we showed a certain amount of money invested in a job without any reflection, at that stage, as to loss or gain. We had received, say, $75,000.00 and spent $100,000.00, we would show $25,000.00 invested in that job at the end of the calendar year. If we had $25,000.00 in one job and $10,000.00 and $5,000.00 in another that would be totaled up, and in our statements to our bank that would be represented as cash invested in jobs, and would not reflect to the outside world any profit or loss whatever.

That is the way we treated it on our books and balance sheet and profit and loss statement. When we began to make income tax returns we ignored it in the same way. Until the job was completed we did not realize we had made a profit or loss because the jobs were not very large, and as a rule they did not extend over a long period. During

(Testimony of H. Stanley Bent.)

the early years if we had a lap-over contract we ignored it entirely on a calendar year basis in making our income tax returns and returned only on a basis of completed contracts.

The witness then testified as follows:

A. As I stated we showed in work that was going on and yet uncompleted we had so many thousands of dollars invested.

Q. Was that so many thousands of dollars an approximation?

A. The exact money in it at that time.

Q. You took no account of the amount you were going to get out of it?

A. No, and threw no light on the matter of whether eventually we would get that money back, whether it was a profit or loss it showed at that time we had spent so much money on a certain group of jobs. That is where some of our assets were. (Tr. 120.)

The books reflected exactly where we stood on a basis of a certain amount of our assets being tied up, invested in certain current jobs not yet completed, but no part of these amounts which we had put into a contract which at the end of the year was uncompleted was reflected either as cost or otherwise on our income tax return until the job was completed. The income tax returns were consistently taken from year to year and each year the books and balance sheet and profit and loss statement was different from the income tax return, if there was an overlapping contract. As our contracts became larger,

(Testimony of H. Stanley Bent.)

jobs that ran through one two and three and even five years, we began to see we were earning or losing a certain amount of money during the calendar year which we should recognize. We then saw for the first time that it was not a logical way to carry those possible profits or losses on and on without reflecting them accurately for ourselves and in our statement to the Government. We had nothing which reflected profit or loss on the uncompleted contracts. We did not reflect profit or loss for our own financial statements, but only as to the amount invested in that job regardless of how it stood. We ignored an [144] amount invested in that job when we came to figure our profit or loss. Our profit and loss statement and our balance sheet did not reflect the same thing, did not fit into each other as they ordinarily do; the amount of our earned income shown by our profit and loss statement, did not go into surplus in our balance sheet. The money we had invested in jobs at the end of the year you might consider could have been diverted into a savings bank or any other depository. It was set out of our business as money invested somewhere on which no report was made as to whether we earned a profit or made a loss. It was invested.

We secured the first large contract that went over a long period of time in 1917, and after that we had no contracts of long duration until 1920.

Q. You said when you got these long term contracts then you found it necessary to adjust your financial statements in a way different from what

(Testimony of H. Stanley Bent.)

you had been doing before. Did you change your method in the profit and loss statement? Is that the way on which you made your adjustment?

A. We figured our profits and losses on the jobs that were completed.

Q. You had not been doing that before?

A. No, as well as completed jobs.

Q. But as to the determination of your assets and liabilities for the purpose of your own balance sheets and credit statements, that practice continued to be the same as it had been?

A. No. Having available figures, having worked out the figures of a profit or loss on an uncompleted job that entered into all our statement of the bank and income tax, and every other statement we made.

While we had previously always showed, as an asset, the investment in uncompleted contracts, we did not show whether we made a loss or gain with reference thereto. Whether we made or lost money [145] is disclosed by our balance sheet as well as by our profit and loss statement by showing certain jobs as having made a loss or certain jobs as having made a profit during the year. We had previously shown this only on completed contracts, and now we showed the uncompleted ones as well.

We carried our profit and loss statement figures into our balance-sheet figures. The uncompleted job is ruled at the end of the year; a certain amount is charged to profit and loss, a balance invested in the job is carried forward, while before that time it was

(Testimony of H. Stanley Bent.)

the amount invested in the job which was the only item carried forward.

Recross-examination.

I presume we made that change about the time we incorporated in 1923 or 1924. (Tr. 125, 126.)

With reference to our 1921 return and to our loss and gain statement shown on our ledger, the amounts there are the same. We showed a loss for 1919 and that conforms with the amount shown on our ledger. These returns conform with our reports as they were kept at that time. The books at that time reflected only completed jobs.

There were the usual contingent liabilities in those contracts that are contained in most contracts of that character. We were liable for personal injuries and things of that sort, but that is covered by compensation. It does not come out of us. Under the contract, the contractor is liable. He may protect himself in any way he sees fit, but as between the contractor and the county we were liable. There often is a penalty in the contract if we did not complete it within a certain period specified. Quite often, but not always, there is a certain stipulated amount specified as liquidated damages. We have done a lot of private work which have no such stipulation. Our municipal contracts I think have that. In final settlements we would be penalized for certain contingencies, but in [146] thirty years we have never had it happen, so I am not very familiar with that possibility.

(Testimony of H. Stanley Bent.)

The work finally was all subject to acceptance not only by the engineer but by the Board. In other words, there never was a completed contract in the sense of being accepted until we had finished the work and the engineer approved, and his report had been adopted by the governing body.

Re-examination by the Member.

The contracts provided usually that the withheld 25% was payable thirty-five days after acceptance, and then we are paid the 25% withheld from time to time.

These contracts were not lump sum contracts. Lump sum is supposed to mean an upset price for a completed job. We rarely ever bid on a job that way. There was no fixed amount that we could not exceed. Our price could run. Whatever it proved to be, so much a unit for how many units we handled.

They were not cost-plus contracts, but we were paid so much a yard. The amount is estimated as accurately as possible for our guidance. We did have a few cost-plus contracts. Municipalities cannot work that way.

Redirect Examination.

As to extra work done under these unit contracts —in some cases, where the unit prices can be applied, they prefer to apply them. If it is something outside of the items covered by the schedules, the cost is agreed upon by the owner and the contractor, and sometimes paid for on a supplementary bid, but more often cost plus ten or fifteen per cent.

(Testimony of H. Stanley Bent.)

Usually the contract provides for that. The latter is what we term a force account.

[147] Recross-examination.

At all times the contractor is bound to save the municipality or person for whom the contract was being performed harmless by reason of any suit or otherwise.

It was thereupon stipulated by and between counsel for the respective parties that the partnership returns of Bent Brothers for the year 1919 and 1921 were made consistently upon the same basis as for the year 1920.

It was thereupon further stipulated that the evidence in this cause, so far as applicable, should be deemed the evidence in the case of Arthur S. Bent, Docket No. 18,476, and the parties further stipulated and agreed to execute and file in the cause of Arthur S. Bent a written stipulation showing the amount of work done during the several years by the partnership of Bent Brothers upon contracts involved in said cause of Arthur S. Bent.

The MEMBER.—I take it in any event there will be a Rule 50 decision.

Mr. MATHER.—Yes.

The MEMBER.—So that everything we decide, no matter what method of computing the taxable income should be decided to be the correct method, the method can be equally used in computing the tax under Rule 50.

Mr. MATHER.—Yes.

Mr. PATROSSO.—Yes.

The petitioner H. Stanley Bent tenders and presents the foregoing statement of evidence in this case, and prays that the same may be approved by the United States Board of Tax Appeals and made a part of the record in this case.

JULIUS V. PATROSSO.
JULIUS V. PATROSSO,
Attorney for Petitioner,
1106 Spring Arcade Building,
Los Angeles, California.

Conformed copy.
(Sig.) Agreed to.
(Signed) C. M. CHAREST.

[148] The foregoing statement of evidence being agreed by both parties is approved.

(S.) J. M. STERNHAGEN,
Member U. S. B. T. A.

3/2/31.

Now, March 19, 1931, the foregoing statement of evidence certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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[149] Filed Oct. 31, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 18,458.

H. STANLEY BENT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and within sixty days from the date of the filing of the petition for review in the above-stated case, transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. Docket entries of the proceedings before the United States Board of Tax Appeals in the case above entitled.

2. Pleadings before the Board, including the amendment and supplement to the petition herein, dated June 19, 1929. (Amendment and supplement set out in statement of evidence.)

[150] 3. Findings of fact, opinion, and decision or judgment of the Board.

4. Petition for review.

5. Statement of the evidence, settled or agreed upon.

The foregoing to be prepared, certified and trans-

mitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) JULIUS V. PATROSSO,
Attorney for Petitioner.

Now, March 19, 1931, the foregoing praecipe certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6449. United States Circuit Court of Appeals for the Ninth Circuit. H. Stanley Bent, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed April 30, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6449.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

H. Stanley Bent,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

PETITIONER'S BRIEF.

JULIUS V. PATROSSO,
Attorney for Petitioner.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 6449.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

H. Stanley Bent,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

PETITIONER'S BRIEF.

This is a petition to review an order of the United States Board of Tax Appeals redetermining the income tax liability of the petitioner for the calendar year 1920. This is a companion case to that of Arthur S. Bent, Docket No. 6450, in this court, which was heard and determined upon the same evidence before the Board of Tax Appeals, and, pursuant to stipulation filed herein, the said cause of Arthur S. Bent is to abide the judgment and decision herein if such judgment be rendered upon the merits.

STATEMENT OF THE CASE.

Petitioner was a member of the copartnership of Bent Brothers for several years prior to and including the years 1920, 1921, and 1922, which said partnership was engaged in the business of constructing reservoirs, dams and similar works. During the year 1920 the partnership executed work on certain unit-price contracts of the same general nature of terms and price as shown by Petitioner's Exhibit No. 1 [Tr., p. 145], except that the Huntington Park Reservoir was a cost-plus contract. The contract for San Dimas Dam, which is typical, is set out at length in the transcript at pages 53-116.

The contracts affecting income taxes here in question are the following [Tr., p. 162-165 and 169-169]:

Name of Contract.	Amount of Work Executed Each Year.			
	1919	1920	1921	1922
Devil's Gate Dam	$140,362.97	$81,838.85		
Huntington Park Reservoir		18,107.27	4,097.89	
Rodeo Drain		19,955.60	9,259.90	
San Dimas Dam		9,464.10	273,390.45	$80,982.60

Under these contracts settlements were to be made monthly for the number of units moved, based on a determination by the owner's engineer, the owner agreeing to pay therefor, less a stipulated hold-back, on a certain date in the following month. [Tr., pp. 157-160.] The owner's engineer determined the quantity of work done each month, applied the unit price provided by the contract and furnished a copy of his determination to the contractor, Bent Brothers.

Bent Brothers kept their books on an accrual basis, that is, the bookkeeper entered in the books the cost of all contracts incurred during the month the work was performed for labor, supplies and expense, and at the end of each month [Tr., pp. 177-179] also entered in the books the amount earned during that month on each of the contracts by charging the owner for 100% of the work and crediting income accounts. At the end of each year Bent Brothers distributed general office expenses, including salary to partners and general employees, to the several jobs worked on during that year on the basis of the cost of each job during the year to the total cost of all work done during the year, thus accruing on the books all of the income and all of the expense for each contract, including cost-plus (force account) contracts, to the end of each calendar year, thus placing expenses and income on an annual accrual basis [Tr., pp. 187 and 191].

In preparing income tax returns on the calendar year basis for the partnership all of the income, costs and expenses accrued upon the books were ignored, except from contracts fully completed. The net income of the partnership computed by this erroneous method was not the net income as reflected by the partnership books [Tr., pp. 188 and 192], and as a consequence the petitioner, in turn, did not report and pay tax upon his share of the correct partnership net gain as shown by the partnership books of Bent Brothers. Petitioner made a return for the year 1920 and included therein his share of all of the partnership net income from the Devil's Gate Dam job, although $140,362.97 was earned on this contract in 1919 and $81,838.85 in 1920 and the net profit reported on the job by the partnership was $26,099.39.

Bent Brothers and this petitioner filed amended returns for the calendar years 1919, 1920, 1921, and 1922, in December, 1923, in order to bring their returns in conformity with the method of accounting regularly employed by the partnership, and also filed claims for abatement and refund of taxes paid and unpaid as shown by original returns. The respondent delegated an internal revenue agent to examine the claims, amended returns and the books of Bent Brothers. The revenue agent rendered a report rejecting the amended returns, allowing abatement of tax caused by an error and changing certain overhead items shown on the original returns, and the respondent approved the findings of the revenue agent and notified taxpayer of his determination [Tr., pp. 17 to 21]. Petitioner appealed to the Board of Tax Appeals, which sustained the action of the commissioner.

ASSIGNMENT OF ERRORS.

Petitioner relies upon the following assignments of error:

(1) The board erred in holding that the original returns of the partnership of Bent Brothers and of this petitioner for the calendar year 1920 were made in accordance with the method of accounting regularly employed in keeping the books of the partnership.

(2) The board erred in holding that the original returns made by the partnership of Bent Brothers and of this petitioner for the calendar year 1920 clearly reflected the annual net income of said partnership and of the petitioner during the said year.

(3) The board erred in holding that the income derived by the petitioner from unit and cost-plus

contracts extending in the course of performance over a period of more than one calendar year or from one calendar year into another calendar year were properly reported in the return filed for the calendar year in which the work was completed or finished, notwithstanding the fact that a portion of said income was earned and accrued upon the books of the partnership in a preceding calendar year or preceding calendar years, and the amount of net income derived from said contracts during each of said calendar years was clearly reflected in the partnership books of account.

(4) That the board erred in finding as a fact that the method pursued by the partnership of Bent Brothers and the petitioner in returning net income was in accordance with the method of accounting regularly employed in keeping the partnership books.

(5) That the board erred in failing to find that the original tax returns filed by petitioner for the years 1920 and 1922 did not correctly reflect his net income for said year.

(6) That the board erred in finding that the amended income tax return filed by petitioner for the years 1920 and 1922 did not correctly reflect his net income for said years.

* * * * * * * * *

(8) That the board erred in holding that it did not have jurisdiction to hear or determine the petitioner's appeal with respect to his income tax liability for the calendar year 1922. [Tr., pp. 137-138.]

QUESTION INVOLVED AND PETITIONER'S CONTENTIONS.

The first six assignments of error involve substantially the same question, which is the principal one presented upon this appeal and may conveniently be considered together. The question thereby presented is the correct method of accounting and reporting for income tax purposes the income derived from the unit and cost-plus contracts, to which reference has been made in the foregoing statement of the case, which were in the course of performance during a period of time extending beyond a single calendar year, and in this regard petitioner contends:

(1) That income from such contracts should be accounted for and reported during each calendar year (the taxpayer's accounting period) and should not be deferred until the completion of the entire contract, and reported as income for the calendar year in which the contract was completed;

(2) That the books of the partnership, properly considered, were kept upon the accrual basis, and that such books correctly reflected the income derived from each of such contracts in each of the calendar years during which the work thereunder was in progress;

(3) That if it be conceded, for the purposes of argument, that the books were not kept upon this basis, then they did not clearly or correctly reflect annual income, and under the express provisions of the statute the partnership's income tax return could not properly be made upon that basis.

We shall now separately notice each of these contentions in the order stated, after which we will discuss the question presented by the eighth assignment of error.

THE APPLICABLE STATUTE AND REGULATIONS.

The particular provision of the Revenue Acts of 1918 and 1921 applicable to the question presented is the same in both acts and is to be found in subdivision (b) of section 212, which reads as follows:

> "The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income."

The following provisions of Regulations 45 and 62 are also pertinent:—

Article 36, Regulations 45, reads as follows:

> "Long-Term Contracts.—Persons engaged in contracting operations, who have uncompleted contracts, in some cases perhaps running for periods of several years, will be allowed to prepare their returns so that the gross income will be arrived at on the basis of completed work; that is, on jobs which have been finally completed any and all moneys received in payment will be returned as income for the year in which the work was completed. If the gross income is arrived at by this method, the deduction from such gross income should include and be limited to the expenditures made on account of such completed contracts. Or the percentage of profit from the contract may be estimated on the basis of percentage

of expenditures, in which case the income to be returned each year during the performance of the contract will be computed upon the basis of the expenses incurred on such contract during the year; that is to say, if one-half of the estimated expenses necessary to the full performance of the contract are incurred during one year, one-half of the gross contract price should be returned as income for that year. Upon the completion of a contract if it is found that as a result of such estimate or apportionment the income of any year or years has been overstated or understated, the taxpayer must file amended returns for such year or years. See section 212 of the statute and articles 22-24."

Articles 22, 23 and 24, Regulations 45, insofar as here material, are as follows:—

"Art. 22. Computation of net income.—Net income must be computed with respect to a fixed period. Usually that period is twelve months and is known as the taxable year. Items of income and of expenditures which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. See article 52. If the taxpayer does not regularly employ a method

of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it."

"Art. 23. Bases of computation.—(1) Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. * * *"

"Art. 24. Methods of accounting.—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. * * *"

Article 36, Regulations 62, reads as follows:

"Art. 36. Long-term contracts.—Income from long-term contracts is taxable for the period in which the income is determined, such determination depending upon the nature and terms of the particular contract. As used herein the term "long-term contracts" means building, installation, or construction contracts covering a period in excess of one year. Persons whose income is derived in whole or in part from such contracts may, as to such income, prepare their returns upon the following bases:

"(a) Gross income derived from such contracts may be reported upon the basis of percentage of completion. In such case there should accompany the return certificates of architects or engineers show-

ing the percentage of completion during the taxable year of the entire work to be performed under the contract. There should be deducted from such gross income all expenditures made during the taxable year on account of the contract, account being taken of the material and supplies on hand at the beginning and end of the taxable period for use in connection with the work under the contract but not yet so applied. If, upon completion of a contract, it is found that the taxable net income arising thereunder has not been clearly reflected for any year or years, the Commissioner may permit or require an amended return.

"(b) Gross income may be reported in the taxable year in which the contract is finally completed and accepted if the taxpayer elects as a consistent practice to so treat such income, provided such method clearly reflects the net income. If this method is adopted there should be deducted from gross income all expenditures during the life of the contract which are properly allocated thereto, taking into consideration any material and supplies charged to the work under the contract but remaining on hand at the time of completion.

"Where a taxpayer has filed his return in accordance with the method of accounting regularly employed by him in keeping his books and such method clearly reflects the income, he will not be required to change to either of the methods above set forth. If a taxpayer desires to change his method of accounting in accordance with paragraphs (a) and (b) above, a statement showing the composition of all items appearing upon his balance sheet and used in connection with the method of accounting formerly employed by him, should accompany his return."

ARGUMENT.

1. The Statute Contemplates and Requires an Annual Accounting for Income, and All Income Derived From the Contracts in Question Should Be Accounted for During the Calendar Year in Which It Was Earned.

It is so well settled as to be elementary that "the structure of all revenue statutes is founded upon the principle that there shall be an annual accounting for income" (*Deer Island Logging Co. v. Commissioner,* 14 B. T. A. 1027; *Atkins Lumber Co.,* 1 B. T. A. 317), and a departure from this postulate is authorized or permitted only under the exceptional circumstance that, *when in order to reflect true income*, a different basis is necessary." (*Deer Island Logging Co. v. Commissioner, supra.*)

In other words, regardless of the method of accounting or bookkeeping employed by the taxpayer, the primary requirement is an annual accounting of income, and a return of all income accrued or received during each calendar year. The solution of the question presented, therefore, turns upon the primary inquiry as to whether or not the income from the unit and cost-plus contracts in question, the duration of which extended over a period of more than one calendar year, can be ascertained and accounted for annually or whether such an annual accounting would not "clearly reflect the income." We respectfully submit that such income can clearly and accurately be determined and reported annually, and, therefore, that no other method of returning was permissible under the circumstances. As already stated, the various units of work performed under the contracts in question by the partnership of Bent

Brothers during each calendar year was definitely determined and ascertained; likewise, the price therefor was fixed by the terms of the contracts, and there is, of course, no dispute that the cost of the work performed during each calendar year was also definitely ascertainable. It would, therefore, seem clear that the partnership at the end of each calendar year could accurately ascertain and report the income derived from these contracts to the extent to which they had been performed within the calendar year, and that there is no necessity or justification for deferring this determination and a report of such income until the completion of the contract in a subsequent calendar year. For illustration, to take a typical instance, the Devil's Gate Dam contract was in course of performance by the partnership during the years 1919 and 1920. At the unit prices fixed by the contract the partnership accrued income therefrom during the year 1919 in the total sum of $140,362.97, and in the year 1920 the total sum of $81,838.85. [See Petitioner's Exhibit No. 2, Tr., pp. 162-163, for quantities.] Inasmuch as the cost of performing the various units in each of these years was definitely known and established, and concerning this there is no dispute, it is difficult to understand how it can be said that an annual return of income on this contract could not be made. Yet the partnership in its original return for the calendar year 1919 reported no part of the income thus accrued upon this contract, and manifestly such original return did not correctly reflect the income of the partnership for that period. Like observations are equally applicable to each of the other contracts in controversy. Clearly, under the statute, it was the duty of both the taxpayer and of the respondent to insist upon an annual

accounting for income, and no action on the part of either could operate to defeat its purpose.

Furthermore, viewed either as a question of accounting practice or legal principle, we believe it apparent that the income from unit and cost-plus contracts of the character here involved should be determined and accounted for annually, and not deferred until the completion of a particular contract simply because it extends over a period of more than a single calendar year. Thus in the case of *Owen-Ames-Kimball Company v. Commissioner,* 5 B. T. A. 921, involving construction contracts similar in character to those here under discussion, the Board of Tax Appeal said (p. 928):

> *"The petitioner asks that the income from 13 long-term contracts described in the findings of fact, for each of the years under consideration, be redetermined upon the accrual basis, that is, by treating the income as accruing during the progress of the work under the contracts and allocating the income to the years in which it was actually earned.* If the income from long-term contracts is computed in such a manner, all items of income and expense will be consistently accounted for upon the accrual basis, which will clearly and correctly reflect petitioner's net income. But the Commissioner takes exception to this method of accounting for income derived from long-term contracts, on the ground that under most of these contracts the commissions or fees, representing the petitioner's profits, were not due and payable until completion and acceptance of the work and could not be considered as income prior to the time they became due and payable. *We think the manner of accounting for income from long-term contracts on the basis contended for by the petitioner is proper*

under the accrual method of accounting." (Italics supplied.)

And further it is said (p. 928):

> "The petitioner's net income for the years 1917 and 1918 should be computed in accordance with the accrual method of accounting, the income from long-term contracts being determined upon the basis that it accrued in the year in which it was earned according to the progress of the work, as evidenced by the expenditures under these contracts."

It is true that by the provisions of article 36, Regulations 45, before quoted, dealing with so-called long-term contracts, a departure from the usual annual basis is permitted, and a taxpayer is permitted to account for income from such contracts during the calendar year in which the contract is completed. In the case at bar the Board of Tax Appeals apparently was of the view that the contracts in controversy came within the classification of "long-term contracts" as that term is used in the Regulations, and that the partnership of Bent Brothers was, therefore, authorized in accounting for income derived from such contracts in the calendar year during which the contract was completed, and that the original returns having been made upon this basis the partnership was barred from filing amended returns upon an annual basis in order to reflect true income and to conform to the method of accounting regularly employed. In this we respectfully submit that the board fell into error.

While the contracts here in controversy may be described as "long-term" by reason of the fact that the

work thereunder extended over a period of more than one calendar year, they are not, in our view, "long-term contracts" as that term is used in the Regulations. As there employed the correct signification of the term comprehends contracts not only the duration of which extends over a period of more than one calendar year, but where the consideration for the work is fixed at a lump sum or flat price, that is to say, a contract where one undertakes to perform a particular work, such as the construction of a bridge or building, which requires more than a single calendar year and where the contracting party agrees to perform the work for a certain total sum. With reference to such contracts it is recognized that it would frequently be extremely difficult, if not impossible, to determine in advance of the actual completion of the work the profit realized or loss sustained in the performance thereof, in any calendar year prior to completion, and hence the usual annual accounting would not correctly reflect income. The mere fact, however, that a particular contract may require more than one year for its performance does not, of itself, present any difficulty in determining annual loss or gain. To illustrate, a corporation enters into a contract to manufacture all of the cans required by a canning company for a period of five years following its execution at a certain stipulated price for each size of can required to be manufactured. While extending over a considerable period of time, this would not constitute a long-term contract, as obviously the manufacturing corporation would have no difficulty in readily ascertaining and accounting for all income accrued from the contract in any calendar year, during its duration. This is the same principle laid down in *Deer Island Log-*

ging Co. v. Commissioner (supra) where the unit involved was "a thousand square feet of timber."

With particular reference to the contracts here in controversy, it is to be observed that none of them contemplate the performance of the completed work for a stipulated total price, but that in each instance the partnership agreed to excavate certain rock or earth as might be required at a stipulated price per unit (cubic yard); to place concrete at a certain stipulated price per unit (cubic yard) and to furnish certain materials such as cement at a certain price per unit (sack) without limitation as to the total cost. The contracts, therefore, had none of the features of a long-term contract except the fortuitous circumstance that the performance of the work thereunder might and did extend over a period of more than one calendar year. The contracts, therefore, are not such as are embodied within the term "long-term contracts" as used in the Regulations, and hence the provisions thereof are not applicable here.

Furthermore, if we assume for the purposes of argument that the contracts here in controversy were long-term contracts, the partnership of Bent Brothers was not permitted to account for and report income thereunder upon any other than an annual basis, by reason of the fact that the provisions of the Regulations in question are applicable only to such situations where true income cannot be reflected by resort to the usual annual basis. Speaking of this, the Board of Tax Appeals in *Deer Island Logging Co. v. Commissioner,* 14 B. T. A. 1027, says (p. 1036):

> "We do not believe this is a case which falls within the permissive language of section 212 of the statute, or within the intendment of the regulations of the respondent promulgated in connection therewith. *The application of the long-term contract basis, as permitted by Article 36 of Regulations 45 and 62, is applicable only to such situations where true income can not be reflected by resort to the usual annual basis.*" (Italics supplied.)

We believe that it has already been clearly made to appear that the usual annual basis would correctly reflect the income derived from each of these contracts in each of the calendar years during which they were in course of performance, and hence that such income must be accounted for and reported annually and not deferred until a subsequent period when the contracts were completed.

A case differing in no material respect in principle from that at bar is that of *Deer Island Logging Co. v. Commissioner, supra.* There the petitioner had entered into an agreement with the Lamb Timber Company, which provided, in effect, that the logging company should cut, remove and haul all merchantable timber located upon a tract of real property owned by the timber company, the petitioner furnishing all equipment and labor necessary to accomplish the result, and to pay to the timber company stipulated prices per thousand feet for various classes and grades of timber located upon the property. The timber in question was located upon a tract of approximately 14,000 acres, certain portions of which were readily accessible, and from which the timber might be readily removed, and others from which it was ex-

tremely difficult to effect the removal. In certain areas the timber was sound and of a heavy stand, while in others it was thin and of an inferior quality. Pursuant to the terms of the contract, the petitioner entered upon the performance thereof, its operations covering a period of five years, but made no report of income from the contract until the year 1924, when it was completed, and thereupon claimed deductions for all expenses incurred incident to its operations under the contract, under the claim that its operations were under a "long-term contract" as used in the Regulations, which justified the report of income in the year in which the contract was completed. The commissioner there determined that the income could *not* be reported upon such basis, and determined deficiencies based upon the ascertainment of net income as reflected in the taxpayer's books on a calendar year basis for each of the years during which the work under the contract was in progress. In sustaining the action of the commissioner, and after using the language already quoted above, the board, at page 1038, says:

> "During each of the years in controversy, petitioner realized a substantial income from sales of timber. Those sales, so far as we know, were completed transactions, and the income thus realized could not be altered by any possible future contingency. The income, and all expenses incident to the production thereof, were definitely ascertainable, and the net income of each year could be readily computed, as the respondent has done. No future adverse happening could have any effect upon the net income of these years. Counsel for petitioner also emphasizes that the income for each of the years was not evenly earned and that the stand of timber was

heavy in some areas, while light in others, and that expenditures were uneven, incident to the cutting of the timber. We can perceive no more distinction or hardship in the case of petitioner than any other taxpayer engaged in similar undertakings. An officer of petitioner testified that had petitioner owned the tract of timber in question it would have been subjected to the same business uncertainties and perplexities as they were operating under the contract. If any such happening as petitioner calls to our attention should be met with, it is, under the statutory rules, to be reckoned with and accounted for in the year in which it takes place. Having realized a net income in each of the years in controversy, the petitioner was in duty bound to make an accounting of it for income-tax purposes.

"This petitioner is in no different situation, as concerns its long-term contracts, than a great many other taxpayers who are carrying on business under somewhat similar conditions. In all our major manufacturing industries, it is customary practice to purchase raw materials under contracts extending well into the future. Scores of taxpayers are engaged in the extraction and sale of coal, oil, gas, and other natural deposits, under royalty lease agreements which in a large majority of cases extend over long periods of years. There are others who under like agreements, are taking the timber from our forests for conversion and resale. See Atkins Lumber Co., 1 B. T. A. 317, where we said, 'the taxing statutes have been designed to levy income and profits taxes upon the gains and profits of business for annual periods and each annual period must necessarily, under the provisions of the law, stand by itself.' To hold that none of these realize income until the purchase or royalty agreements have expired, and all of

> the products taken under them have been converted and disposed of, would be a paradoxical ruling without statutory foundation. Yet, that is the logical end to which petitioner's reasoning leads."

The foregoing language is clearly applicable to the case at bar, for, as we have already noticed, the income and all expenses incident to the work performed under each of the contracts in controversy by the partnership of Bent Brothers were definitely ascertainable, and the net income of each year could be readily computed at the close of each calendar year. Thus the accounts kept on the construction of Devil's Gate Dam, to which reference has already been made, showed at the end of the year 1919 that $140,362.97 had been actually earned in that year. The evidence without dispute shows that the cost of earning this sum was accrued in the books of the partnership in the year 1919 [Tr., pp. 173-174; 178]. This being the case, there could be but one course to be followed in determining the actual net income on this contract, and that was to apply the cost against the gross income and determine the gain or loss on this contract on an annual basis or to December 31, 1919. The gross income from this contract during the year 1920 was $81,838.85, which amount is approximately 36.5% of the total earnings upon the contract, and it is manifestly incorrect to ignore the annual accounting period when the figures are available to produce the annual net income, and to account for and report the total amount earned on the contract during the year 1920 simply because the contract was finished in that year.

As indicated by the opinion of the Board of Tax Appeals in the case at bar, upon what is deemed the erroneous assumption that the partnership of Bent Brothers was authorized to account for income under the contracts in question either upon an annual basis or upon completion of the contract, it held that by filing the original returns for the years in question it had elected to account for income upon the completed contract basis and was estopped from reporting upon an annual basis. [Tr., p. 133]. What has already been said we believe completely disposes of this suggestion, for no election can be made between a legal and an illegal method, but an election is permitted only as between two methods either of which is legally applicable. As already stated, a departure from an annual accounting for income is authorized and permitted only where true income cannot be reflected by resort to that basis. (*Deer Island Logging Co. v. Commissioner, supra.*) If, however, the income may be correctly reflected by resort to the annual basis, no right of election is conferred, and regardless of the action of the taxpayer he cannot be said to have estopped himself from correctly reporting his income on an annual basis by reason of his previous erroneous assumption that the same might be reported upon a different basis not authorized by law. Furthermore, each of the revenue acts and the administrative regulations promulgated thereunder not only recognize the right of the taxpayer, upon discovery of an error, to correct his return so as to reflect true income, but are designed to enforce such action upon his part. In discussing a similar principle involving the option conferred by the Revenue Act of 1916, section 13

(d), the Supreme Court in *Aluminum Castings Co. v. Routzahn,* Adv. Op. 1930-31, p. 36, says:

> "By these sections the filing of a return under section 13 (d), where the taxpayer is able to comply with its requirements, is optional if he is also able to prepare a return on the basis of actual receipts and disbursements which reflects true income. *But 'notwithstanding the option given taxpayers, it is the purpose of the Act to require returns that clearly reflect taxable income.'* United States v. Mitchell, 271 U. S. 9, 12, 70 L. ed. 799, 801, 46 S. Ct. 418. By section 13 (b) of the 1916 Act, which was new, the return in every case is required to state such data as are 'appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title.' *It follows that the return must be filed on the accrual basis under section 13 (d), where true income cannot be arrived at on the basis of actual receipts and disbursements.* See United States v. Anderson, 269 U. S. 437, 440, 70 L. ed. 349, 350, 46 S. Ct. 131, *supra.*" (Italics supplied.)

What has been said, we believe, also serves to clearly distinguish the case at bar from that of *Ellis v. Commissioner,* 16 B. T. A. 1225, cited by the Board of Tax Appeals in its opinion herein. In the cited case, while the facts do not clearly appear from the opinion, there was apparently involved a lump sum contract, by reason of the fact that the board, in support of its conclusion, cites the case of *In re Harrington,* 1 Fed. (2d) 749, which involved contracts of that character, as will appear from the following quotation from the opinion:—

> "The firm contracts to do the engineering work for a *stated sum*, depending, of course, upon certain contingencies." (Italics supplied.)

Neither the Ellis nor the Harrington case, therefore, militate against our position, for there was involved in those cases true "long-term contracts" as contemplated by the Regulations. This distinction is also adverted to by the Board of Tax Appeals in *Deer Island Logging Co. v. Commissioner, supra.*

2. The Books of the Partnership Were Kept Upon the Accrual Method, and Correctly Reflected the Annual Income Derived From All Sources in Each Calendar Year.

We have already stated in detail the method employed by the partnership of Bent Brothers in keeping its books of account, and concerning the facts stated there is no dispute in the record. Admittedly, the books of the partnership were kept upon an accrual basis and the income and expenses earned or incurred upon each of the contracts in question were accrued monthly with the exception of certain items of general overhead which were apportioned and allocated against the various contracts at the end of each calendar year. [Tr., pp. 173-174; 178]. In view of the evidence in the case at bar, it cannot be successfully contended that the books of the partnership were kept upon any other than the accrual basis, which is defined by the Board of Tax Appeals in the case of *Owen-Ames-Kimball Company,* 5 B. T. A. 921, as follows:

> "The accrual method of accounting requires that at the end of every accounting period all income

> which has been earned during the period must be accounted for as income accrued in that period, though perhaps not collected, because it is not due and will not be collected until some future date. It contemplates that the income shall be determined on the basis of a fair distribution between the periods during which the income accrues. Under such a system of accounting a taxpayer accrues income, it does not receive it. Appeal of Clarence Shock, 1 B. T. A. 528 (1925 C. C. H., B. T. A. 2350)."

The Board of Tax Appeals, however, in its opinion, while in nowise controverting the facts as herein stated, concludes that, at least insofar as the contracts here in question are concerned, the books were not kept upon an accrual basis but rather upon a completed contract basis. [Tr., pp. 132-134]. In reaching this conclusion the board relies upon the fact that while the items of income and expense accrued and/or incurred on these contracts were entered as accrued and/or incurred, they were entered "not in general accounts but in specific contract accounts and were not carried into the earnings of the business until the project was completed," [Tr., pp. 132-133] and "not until the completion of the project were these carried into profit and loss to determine gain or loss in the business." [Tr., pp. 132-133.] It is true that the accounts of each of the contracts in question which were uncompleted at the end of a calendar year were not closed in the sense that the loss or gain incurred or earned during the calendar year was carried to profit and loss, but this was, if anything, but an erroneous procedure under a correct method of bookkeeping on the accrual method by which the books were kept, and would not operate to

alter "the method of accounting regularly employed" by the partnership. The method of accounting regularly employed being the accrual method, and it admittedly correctly reflecting the annual income of the partnership, the express provisions of the statute hereinbefore quoted require that the tax return be made in accordance therewith, and this irrespective of whether or not the various items of income and expense were carried in general or specific accounts or whether reflected in an account termed "profit and loss" or in an "investment" or "uncompleted contract account." The rights and duties of the partnership, insofar as income tax is concerned, did not and do not depend upon the terms applied to the various items in the books. The statute is not concerned with mere matters of form, but of the substance (*Doyle v. Mitchell,* 62 L. Ed. 1054, 1060), and looking through the form we find the books of the partnership so kept as to readily and correctly reflect the income derived during each calendar year from all of the operations of the partnership, and it is this income which the law requires to be accounted for regardless of whether or not the partnership or its bookkeeper entered it in a particular account labelled "profit and loss." As is well said by the Circuit Court of Appeals of the Second Circuit, in *Douglas v. Edwards,* 298 Fed. 299:

> "The rights of the parties can neither be established nor impaired by the bookkeeping methods employed nor by the names given to the various items."

And in *Appeal of Max Schott,* 5 B. T. A. 79, 88, it is held that:

> Where the amount of income or deduction is definitely estimable at the end of the taxable year a

> taxpayer keeping his books and making his return on the accrual basis will be requested to accrue the amount of such income or deduction for such year even though the computation and entry may not be made until after the close of the taxable year.
>
> *Borden Mfg. Co. v. Comm.*, 6 B. T. A. 276, 278: *Canton Art Metal Co. v. Comm.*, 6 B. T. A. 446; *J. F. Irwin v. Comm.*, 8 B. T. A. 687.

We respectfully contend that the character of a particular method of accounting may not be essentially altered by the method by which profit and loss is determined at the end of an accounting period. When the statute speaks of "the method of accounting regularly employed in keeping the books of such taxpayer" it, of necessity, must have reference to the general system of accounting, and not the detailed accounts or the manner in which isolated items may be treated in the books from time to time. The mere fact that a taxpayer keeping his books upon the accrual basis fails to accrue an item of income during the particular calendar year when earned would certainly not operate to convert his method of accounting to an entirely different method upon which he might return his income for income tax purposes. We, therefore, submit that it cannot be said, as it was by the Board of Tax Appeals, that the original returns filed by the partnership of Bent Brothers for the year in question were in conformity with the method of accounting regularly employed, for they wholly failed to reflect income accrued upon the books of the partnership during that particular period.

3. If It Be Conceded, for the Purposes of Argument, That the Books Were Not Kept Upon the Accrual Basis, They Did Not Clearly or Correctly Reflect Annual Income.

From what has already been said, it is manifest that the fundamental requirement of the statute is an annual accounting for income regardless of the method of accounting employed by the taxpayer. Therefore, if we concede, for the purposes of argument, that the Board of Tax Appeals correctly concluded that, by reason of the failure of the partnership of Bent Brothers to carry the items accrued upon its books upon the contracts in question to profit and loss at the end of each calendar year, they were not kept upon the accrual method, it is our contention that, so considered, the books would not correctly reflect income, and the taxpayer could not, if he had so desired, make income tax returns for the year in question upon this basis.

As we have already endeavored to point out in a preceding portion of this brief, an annual accounting may be departed from only when such method does not clearly reflect income, and that in the case at bar an annual accounting is the only method that would truly reflect this income. Therefore, neither by virtue of the method of accounting regularly employed by the partnership, nor otherwise, was it authorized to return income except upon an annual basis. However, if the conclusion of the Board of Tax Appeals upon this phase of the case, that is, that while the partnership accrued income and expenses as earned or incurred, it did not carry the same to profit or loss until the completion of the contracts extending

beyond the calendar year, is correct, it would seem to follow that the books of the partnership cannot be said to have been kept upon any particular method, and it would then be necessary to cast aside the method or methods of accounting employed, and by other means determine what the income of the partnership was for each particular calendar year. Viewed in this light, the situation here presented is identical to that considered by the Board of Tax Appeals in the case of *Owen-Ames-Kimball Company,* 5 B. T. A. 921. As already stated, the taxpayer there was engaged principally in the construction of buildings, the work under which commenced in one taxable year and was completed in another, and the method of bookkeeping there employed may best be described in the language of the opinion as follows:

> "It can not be said that any definite method was employed in keeping the petitioner's books of account. Certain it is that the manner in which the books were kept did not conform either with the cash receipts and disbursements method or the accrual method of accounting, the two alternative methods provided by statute for keeping accounts and making returns of income. Appeal of Chatham & Phenix National Bank, 1 B. T. A. 460 (1925 C. C. H., B. T. A. 2305); Appeal of Henry Reubel, Executor of the Estate of John Kroder, 1 B. T. A. 676 (1925 C. C. H., B. T. A. 2443); Appeal of B. B. Todd, Incorporated, 1 B. T. A. 762 (1925 C. C. H., B. T. A. 2497). All items of income and expense, other than income from long-term contracts, were entered upon petitioner's books and accounted for in accordance with the accrual method of accounting. Income from long-term contracts, an important and perhaps the chief item of income in the petitioner's business, was

accounted for on petitioner's books in an entirely inconsistent manner. There existed no uniform practice as to the time and manner of accounting for income from that source. This income was accounted for at the caprice of the bookkeeper, at irregular periods, and in amounts which were not determined upon any definite or reasonable basis. At times the profit to be derived from long-term contracts was accounted for on the books when work was commenced. On other occasions it was taken up on the books of account during the progress of the work, but at times and in amounts that bore no relation thereto. And as a further variation, there were instances when the income was not accounted for until the completion of the work under contract. In the latter case, the accounting for that income was on the basis of actual receipts, notwithstanding that the expenses incident thereto were accounted for in a prior year and not deferred to be offset against the income."

After detailing the method of accounting employed, the board says:

"It is perhaps superfluous to say that it is a fundamental principle, in computing net income under the several income tax acts, that all items of income and expense shall be consistently accounted for on the same basis; and any method of accounting which fails to recognize and give effect to this principle will not clearly reflect net income. The facts as to the manner in which petitioner's books of account were kept, during the years involved in this appeal, are such that we are convinced that the method employed in keeping the accounts did not conform with either of the two alternative bases provided by statute, and did not clearly reflect petitioner's net income. *It fol-*

lows that any computation of net income based upon the method employed in keeping the accounts will not result in a correct determination of net income, to which the petitioner is entitled, and resort must be made to some other method." (Italics supplied.)

Inasmuch, therefore, as the method of accounting employed by the partnership of Bent Brothers, viewed in the light in which it was by the Board of Tax Appeals, did not correctly reflect annual income, the partnership could not legally report the same in conformity therewith, but was required to determine its true annual income regardless of the method of accounting employed and report the same as so determined.

4. The Board of Tax Appeals Erred in Refusing to Entertain Jurisdiction of the Petitioner's Appeal Covering Income Taxes for the Calendar Year 1922.

The question now to be discussed arises under the eighth assignment of error [Tr., p. 138], and arises by reason of the refusal of the Board of Tax Appeals to entertain jurisdiction of petitioner's appeal covering income taxes for the calendar year 1922 upon the asserted ground that no deficiency had been determined by the respondent for that year. [Tr., pp. 166-167.] The facts in this connection may be briefly stated.

Petitioner filed an income tax return for the calendar year 1922 showing a net taxable income of $162,459.30. He correctly calculated the tax as follows:

4% on $4,000.00,	$ 160.00
8% on $155,659.30,	12,452.74
Surtax,	52,565.06
Correct total,	$65,177.80

These items, with the exception of the total, were as shown by the taxpayer upon his return, but in adding the various items the petitioner set down the wrong total, incorrectly stating it as $66,617.80. On examination of the return the respondent increased the taxable income of the petitioner from $162,459.30 to $163.818.39, or by $1,359.09, and calculated the tax thereon as follows [Tr., p. 32]:

4% on $4,000.00,	$ 160.00
8% on $156,947.14,	12,555.77
Surtax,	53,213.01
Total,	$65,928.78

The total last shown is the tax determined by the commissioner.

After the filing of the return the petitioner discovered the error which he had made in addition and on December 14, 1923, filed a claim for abatement. Thereafter, in June, 1925, a revenue agent, acting on instructions from the commissioner to whom the claim was addressed, examined said claim for abatement, noted the error and allowed the claim so far as the overaddition of the items of tax was involved, but delving further into the tax liability of the taxpayer claimed an understatement of taxable income and paired the tax on this claimed understatement or deficiency against the overaddition previously allowed. The action of the revenue agent was approved by the commissioner, and as a result the petitioner's tax liability was accordingly increased over the amount correctly shown by his return, but was less than the total shown by reason of the error in addition already mentioned. Upon these facts the Board of Tax Appeals held

that the action of the commissioner did not constitute the determination of a deficiency and that as a result it was without jurisdiction to hear the appeal.

Sections 273 and 274 of the Revenue Act of 1926, in so far as here material, dealing with the subject of a deficiency, read as follows:

> "Sec. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—
>
> (1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such taxes; * * *"
>
> "Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *"

We respectfully contend that by virtue of the facts above stated the commissioner determined a "deficiency" by reason of the fact that the amount of tax as determined by him "exceeds the amount shown as the tax by the taxpayer upon his return." A reading of section 273, quoted above, discloses that the statute does not use the word "assessed," and that it is expressly provided that

the amount shown as the tax by the taxpayer on his return shall first be decreased by the amounts previously abated. In the case at bar the abatement of the very apparent error in addition of the tax items as shown by the petitioner's return should have and did take place first by action of the proper representative of the commissioner, and as the tax had not then been paid the abatement was proper, and the action of the commissioner operated to determine a deficiency by reason of the fact that the amount of tax as determined by the commissioner exceeded that as shown by the taxpayer's return. It is true that the commissioner did not forward to the petitioner a notice of deficiency as required by section 274, quoted above, but his failure so to do cannot operate to deprive the Board of Tax Appeals of jurisdiction, as the action taken by the commissioner, in fact, operates to determine a deficiency. The fact which gives the Board of Tax Appeals jurisdiction is the determination of the deficiency, and not the mailing of notice thereof by the commissioner to the taxpayer, which is of importance only in fixing the date when the sixty-day period within which the taxpayer may appeal to the board commences to run.

In the case of *John Moir v. Commissioner,* 3 B. T. A. 21, the Board of Tax Appeals, speaking of a deficiency, says it "is the amount which he (the taxpayer) admits to be due, and not the amount which appears upon the face of his return, which is deemed the starting point in the computation of a deficiency." If this be a correct statement of the law, it would appear manifest that the commissioner determined a deficiency in the case at bar for the year 1922 by reason of the fact that in his return

the petitioner admitted a tax liability in an amount less than that as finally determined by the commissioner, and hence the Board of Tax Appeals was vested with jurisdiction to hear and determine the petitioner's appeal for the calendar year 1922, and erred in refusing to entertain the petitioner's appeal with reference thereto.

CONCLUSION.

For all of the foregoing reasons, we submit that the original tax returns filed by the petitioner for the years in question were neither computed in accordance with the method of accounting regularly employed nor did they correctly reflect his true income for the period in question; that the Board of Tax Appeals had jurisdiction to hear and determine the petitioner's appeal for the year 1922, and that the board erred in its determination of these questions.

Respectfully submitted,

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No. 6449

In the United States Circuit Court of Appeals for the Ninth Circuit

H. STANLEY BENT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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CITATIONS

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BRIEF FOR RESPONDENT

PREVIOUS OPINION

The only previous opinion in the present case is that of the Board of Tax Appeals (R. 125), which is reported in 19 B. T. A. 181.

JURISDICTION

The appeal is taken from a decision of the Board of Tax Appeals in respect of individual income and surtaxes for the year 1920 in the amount of $60.50, final order of redetermination being entered on May 14, 1930, and from the decision of the Board of Tax Appeals that it had no jurisdiction over the year 1922, there being no deficiency asserted for

that year. (R. 135.) The case is brought to this court by a petition for review filed October 31, 1930 (R. 135), pursuant to the provisions of the Revenue Act of 1926, c. 27, Sections 1001, 1002, and 1003, 44 Stat. 9, 109, 110.

QUESTIONS PRESENTED

1. Under the evidence of record did the Board properly affirm the determination of the Commissioner that petitioner maintained his records and correctly reported income on a "long-term completed contract" basis?

2. Did the Board properly affirm the determination of the Commissioner where no evidence was adduced from which the tax liability could be determined on any basis other than that adopted by the Commissioner?

3. Did the Board err in dismissing the proceeding for 1922 for want of jurisdiction, the Commissioner's determination having been that there had been an overassessment of tax for that year?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 212. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.
>
> (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with

the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. * * *

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership.

* * * * *

(d) The net income of the partnership shall be computed in the same manner and on the same basis as provided in section 212

except that the deduction provided in paragraph (11) of subdivision (a) of section 214 shall not be allowed.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *

* * * * *

(f) * * * If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of

the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered, for the purposes of this subdivision or of subdivision (a) of this section, or of subdivision (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

Treasury Regulations 45:

ART. 36. *Long-term contracts.*—Persons engaged in contracting operations, who have uncompleted contracts, in some cases perhaps running for periods of several years, will be allowed to prepare their returns so that the gross income will be arrived at on the basis of completed work; that is, on jobs which have been finally completed any and all moneys received in payment will be returned as income for the year in which the work was completed. If the gross income is arrived at by this method, the deduction from such gross income should include and be limited to the expenditures made on account of such completed contracts. * * *

STATEMENT OF FACTS

The essential facts as found by the Board of Tax Appeals are as follows (R. 126–131):

Petitioner, a citizen and resident of the state of California, was during 1920 a member of the firm

of Bent Brothers, a partnership composed of himself and Arthur S. Bent. The partnership is engaged in the construction under contracts of dams, reservoirs, canals, and similar projects. Frequently such projects are not completed within the same taxable year in which the work is begun.

The method of accounting regularly employed in keeping the partnership's books, from the inception of the business in 1910 until the partnership was succeeded by a corporation in 1923, was as follows: A separate account was kept in the partnership books for each project undertaken. At the end of the month this account was charged with the cost, whether paid or not, of all labor, materials, and direct expenses incurred during the month and chargeable to the project. At the close of the year the account was charged with its proportion of the indirect expenses, or overhead, of the business incurred during the year, whether paid or not. The overhead was distributed over the several projects upon which work had been performed during the year in the same proportions that the total costs of each project incurred during the year bore to the total costs of all projects incurred during the year. If the contract provided for payment upon completion of the project the customer's account was charged and the separate account of the project was credited when all work was completed and accepted. If payment was to be made as the work progressed, upon the basis of monthly estimates by the customer's engineer of

work completed during the month and the amount of payment due therefor, the customer's account was charged, and the separate account of the project was credited, as such estimates were received, with the amount of payment shown to be due by the estimate. If the contract provided that a percentage of the amount due on each estimate was to be withheld pending completion and acceptance of the project, the separate account of the project was credited only with the payment due and the amount of the holdback was credited to "Retention Account." No accounting was made for any gain or loss on any project until the work was completed and accepted. Until that time the debit balance in a project account was considered an investment and carried on the books as an asset. When work was completed and the project accepted, the project account was closed by transferring the balance representing gain or loss to profit and loss account.

The net income reported by the partnership in all returns filed for Federal income-tax purposes was computed in accordance with the method of accounting employed in keeping the books.

During 1920 the partnership was engaged on four projects which were not completed in the same taxable year in which work was begun. Devil's Gate Dam was commenced in 1919 and completed in 1920; work on Huntington Park Reservoir began in 1920 and was completed in 1921; work on Rodeo Drain started in 1920 and was completed in 1921;

and work on San Dimas Dam began in 1920 and was completed in 1922.

Devil's Gate Dam was constructed within the Los Angeles County Flood Control District. This contract provided that compensation should be paid to the partnership upon the basis of monthly estimates of materials furnished and work completed. Compensation shown to be due by the monthly estimates of the chief engineer of the Flood Control District were usually paid by the tenth of the following month.

In accordance with the method of accounting employed in keeping the books, the partnership included in the return for 1920 the entire compensation received for and all of the costs and expenses incident to the construction of Devil's Gate Dam which was completed in that year, but did not include the income or expenses relating to the three other projects commenced but not completed in that year. It was the partnership's custom to report income from each job when it was completed.

Upon auditing the returns of the petitioner, the respondent determined a deficiency for 1920 and overassessments for 1919, 1921, and 1922, all of which was communicated to the taxpayer in the usual form of notice for the deficiency. The petitioner's contention was that his income should have been computed each year on the accrual basis entirely without regard to the partnership's method of treatment of the long-term contracts, and that the Commissioner was in error in his de-

termination that the books of the partnership were kept on the completed long-term contract basis and so considered reflected net income according to a recognized method. The Board of Tax Appeals found as a fact that the books of the partnership were maintained on the completed long-term contract basis, and that the method of recording and reporting income had been followed from 1913 to 1922, and that such method was in accordance with Section 212 of the Revenue Act of 1918 and accurately reflected income. (R. 132, 133.)

The Board of Tax Appeals also held that inasmuch as the Commissioner had determined an overassessment for the year 1922, as to that year it was without jurisdiction. The Board further found, in regard to the insufficiency of the evidence adduced by the petitioner to sustain his contentions as the method which should have been adopted (R. 134), that—

> * * * since the deficiency has been determined by this method and petitioner has not established what in fact was the income resulting from the method he suggests with the consequent tax liability, the deficiency could not be set aside on the record in any event.

The Board accordingly affirmed the determination of the Commissioner and entered its final order that there was a deficiency of $60.50 for the year 1920. From this decision this case is brought to this court.

SUMMARY OF ARGUMENT

The record supports the finding of fact by the Board that the books were maintained upon a completed contract basis. Such basis clearly reflected income and such basis was consistently used in the reporting of income for Federal tax purposes and was therefore proper in this case.

There was no evidence adduced to prove that the books were kept on any basis other than that which was adopted by the Commissioner to ascertain the amount of income. Accordingly the Board properly affirmed the determination of the Commissioner.

The proceeding with respect to the year 1922 was properly dismissed by the Board for want of jurisdiction, no deficiency for that year having been determined by the Commissioner.

ARGUMENT

I

The record supports the finding of fact by the Board that the books were maintained upon a completed contract basis. Such basis clearly reflected income and such basis was consistently used in the reporting of income for Federal tax purposes and was therefore proper in this case

The Board of Tax Appeals found that the partnership kept its books on the long-term completed contract basis and therefore determined the petitioner's tax for 1920 in accordance with the provisions of Article 36 of Regulations 45. The peti-

tioner is liable in his individual capacity for his distributive share of the net income of the partnership. (Sec. 218 (a), Revenue Act of 1918.) We respectfully submit that the decision of the Board was in exact accordance with the law.

Section 212 (a) and (b) of the Revenue Act of 1918 provides that net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer. Article 36 of Regulations 45, promulgated under Section 212, *supra,* provides:

> Persons engaged in contracting operations who have uncompleted contracts * * * will be allowed to prepare their returns so that the gross income will be arrived at on the basis of completed work; that is, on jobs which have been finally completed any and all moneys received in payment will be returned as income for the year in which the work was completed. If the gross income is arrived at by this method, the deduction from such gross income should include and be limited to the expenditures made on account of such completed contracts. * * *

The provisions of Section 212, *supra,* have been reenacted without change in the corresponding section of the Revenue Act of 1921, c. 136, 42 Stat. 227; Revenue Act of 1924, c. 234, 43 Stat. 253; Revenue Act of 1926, c. 27, 44 Stat. 9; and Revenue Act of 1928, c. 852, 45 Stat. 791, which comprise all the revenue laws enacted since that time. This con-

sistent reenactment by Congress, in view of this interpretation of the methods to be employed in arriving at net income made by those charged with the administration of the revenue laws, gives it as full effect as though it were part of the statute itself. *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232; *Brewster* v. *Gage,* 280 U. S. 327; *United States* v. *Jackson,* 280 U. S. 183; *Uniform Printing & S. Co.* v. *Commissioner* (C. C. A. 7th), 33 F. (2d) 445; *Fidelity Nat. Bank & T. Co.* v. *Commissioner* (C. C. A. 8th), 39 F. (2d) 58; *Marsh Fork Coal Co.* v. *Lucas* (C. C. A. 4th), 42 F. (2d) 83.

It is readily apparent, therefore, that one keeping books upon the basis above described must under the law report his income on that basis. The Board specifically found (R. 133) that the partnership's and petitioner's returns were properly made on the long-term completed contract basis and that this was in accordance with the accounting method regularly employed, and that the Commissioner was fully justified in adopting that method in auditing the return. This finding of fact with respect to the method of keeping the partnership's books finds ample support in the record. The general procedure adopted was to file at the end of each month the engineer's estimate as to the amount of work done and compensation due under each contract. (R. 175–176.) This practice was followed in connection with each contract and the general cost was put on the books monthly and at the end of the year a portion of the overhead was put into

each job to give the full cost of the job for the year. (R. 178.) The cash received was entered on the books but nothing else was done with it until the end of the job. (R. 180.) The books were not closed on these several jobs at the close of the year and the returns made accordingly because it had not been the custom. (R. 183.) The expense which was credited to the jobs was not charged to profit and loss at the end of the year but was withheld until the job was completed. (R. 185.) This method of bookkeeping had been consistently followed from 1912 through 1922. (R. 185.) The returns had been made consistently upon a completed contract basis irrespective of the annual period. *The profit and loss account never reflected the earnings for the year until the job was completed.* (R. 187–188.) Wilbur Atkinson, in charge of the records of the partnership, testified as follows (R. 189):

> We did not at that time carry income on uncompleted contracts into profit and loss account until they were completed; when they were, then we showed them on our returns. Our returns at that time should have conformed to the loss and gain account, but not to the job accounts. *Until we closed our job account we did not show any loss and gain.* (Italics ours.)

The petitioner herein testified (R. 191) that jobs which carried over from one year to another were not analyzed at the end of the year except for the personal information of the mangers. He testified

that the amount invested in each job was ignored when they came to figure the profit and loss at the end of the year. (R. 193.) The partnership treated the money invested in an uncompleted job at the end of the year as money invested in a savings bank or any other depository. The general books of the taxpayer during the year under review reflected only completed jobs. (R. 195.)

In the face of this consistent testimony, we submit that there is ample evidence to support the finding of fact by the Board of Tax Appeals that the accounting records of the partnership and the petitioner were maintained upon a completed contract basis. This finding of fact supported by substantial evidence can not properly be disturbed by this court upon review. *American Sav. Bank & Trust Co.* v. *Burnet* (C. C. A., 9th), 45 F. (2d) 548. (See also the numerous cases therein cited by this court.)

In the petitioner's brief stress is laid upon the statement that the books of the partnership and petitioner were maintained upon an accrual basis and the conclusion is drawn from this fact that a completed contract basis was therefore not adopted. Not only is this not established by proof, but it can not be said in any event that the books, as far as the separate job accounts are concerned, were on the accrual basis. The accrual method of accounting requires that at the end of each accounting period all income which has been earned during the period must be accounted for as income accrued

in that period. *Allhands* v. *Crooks,* U. S. D. C. W. D. Mo. (not yet reported but to be found in C. C. H. Federal Tax Service, Volume III, at par. 9057). Not only were accounting periods disregarded while the separate jobs remained uncompleted, but the general books of the partnership did not show all the income accrued in any given year. The job accounts were taken into consideration only when the particular contract was completed within that accounting period. However, for the sake of argument, admitting that the general books of the partnership were maintained on an accrual basis, we submit that there is nothing inconsistent with the adoption of an accrual basis of accounting for the general books and the treatment of records according to the completed contract method at the same time. The accrual basis as defined by the Supreme Court in *United States* v. *American Can Co.,* 280 U. S. 412, is that "basis where pecuniary obligations payable to or by the company were treated as if discharged when incurred." In a manner entirely consonant with this method of keeping records the rights to receive compensation predicated upon the engineer's monthly estimates were entered upon the books as the work progressed.

The recognition of obligation or rights coming into existence in advance of discharge or realization by cash transaction is the sum and substance of what is embraced in the accrual basis as distinguished from cash receipts basis of accounting.

The completed contract method merely permits a further plan or basis of maintaining records to be recognized for tax purposes. It sanctions the charging of the obligations and rights when incurred upon the books, not to the general profit and loss accounts, but to the separate job accounts and permits each job or contract account to remain open for profit and loss determination until that particular job or contract has been completed. Thus in the case of *Grays Harbor Motorship Corporation* v. *United States,* 45 F. (2d) 259, the Court of Claims noted in its findings of fact that "the plaintiff kept its books of account on the accrual basis" and then continued to point out that it had failed to keep its records on the completed contract basis but had reported its income as earned without reference to the completion date of the contract. In the case of *Harrison* v. *Heiner,* 28 F. (2d) 985, the District Court for the Western District of Pennsylvania found as a fact that the plaintiff kept its books and filed its return on the accrual basis and also that its method of accounting and method of reporting income for Federal tax purposes was to include the total amount from each contract in the year in which the contract was finished. In this case the completed contract basis of accounting was approved. It is thus apparent that there is no inconsistency when books are kept on the accrual basis and the completed contract method used at the same time, and that a computation of income on the accrual basis of accounting

can readily be made on either the "completed contract" or "percentage of profit upon partial completion" basis at the option of the taxpayer as provided in Article 36, Regulations 45.

When the completed contract method is used in cases where the taxpayer is on the accrual system of accounting the only variation from the regular course of treatment is that the accruals in each job account are recognized for the first time when that particular contract is completed.

The petitioner in his brief urges that the only type of long-term contracts which may properly afford a basis for the reporting of income upon the completed contract basis are those contracts which he designates as lump-sum contracts. He contends that *only* in that type of contract is the determination of the correct income realized upon the contract at any given time prior to completion difficult or impracticable. It appears, however, that the same difficulty or impracticability is encountered where the payment is *not* on the lump-sum plan. We submit that there is never an assurance that costs of operation will remain at a constant level; that items of expense may not occur in one period and be properly allocable over an entire project covered by the long-term lump-sum contract, or some other condition arise which would make a completed contract basis of accounting the more accurate method of reflecting income than any other basis. As a practical matter, profit or loss can never be absolutely determined in any case until per-

formance has been completed on the entire contract in accordance with the terms thereof. · It is not until the contract has been completed by the contractor that he has earned the full consideration for which he contracted. It is therefore apparent that in the choice of methods of treating long-term contracts the completed contract basis is the one which is most apt to correctly reflect the income of the taxpayer. It is further apparent that there is no distinction regarding these considerations between the lump-sum type of payment or the per unit of completion type. No distinction can be maintained when based merely upon the payment plan of a given contract.

The Regulations allow long-term contracts to be treated in two ways; on the basis of completed work (in which case there is no question as to the profit earned) and on the estimated percentage of profit made during the year based upon the amount of expenses incurred during the said year. In the latter case, if it later developes that the estimate was erroneous, an amended return must be filed to show the correct income. That the first method mentioned is more apt to reflect true net income in accordance with the Statute is manifest.

The argument of the taxpayer and case cited to support the contention (Br. 29, 30, 31, 32) that if it be conceded that the books were not kept on the accrual basis they did not correctly reflect the annual income is of little value in view of the fact that, not only does the government maintain that

there is nothing in the acceptance of the completed contract basis which precludes the method of keeping books on the accrual system but the petitioner here was consistent throughout in the treatment of the long-term contracts. This in itself distinguishes the instant case from the case cited by the petitioner and is in no way identical with it as he states. The case in question, *Owen-Ames Kimball Co.*, 5 B. T. A. 921, cited by petitioner on page thirty of his brief, manifests the difference when it states (pp. 30–31):

> Income from long-term contracts * * * was accounted for on petitioner's books in an entirely inconsistent manner. There existed no uniform practice as to the time and manner of accounting for income from that source. This income was accounted for at the caprice of the bookkeeper, at irregular periods, and in amounts which were not determined upon any definite or reasonable basis.

In view of the foregoing, it is submitted that the Board properly found that the petitioner and the partnership maintained their records on the completed contract basis; that this basis was sanctioned by the Revenue Act and had been consistently adopted by the taxpayer in the reporting of taxable income from 1913 through 1922. The Board of Tax Appeals therefore properly affirmed the Commissioner's determination of taxable income upon this basis.

II

There was no evidence adduced from which the amount of income could be ascertained upon any basis other than that adopted by the Commissioner. Accordingly, the Board properly affirmed the determination of the Commissioner

The foregoing consideration of this case has been directed to the propriety of the Commissioner's determination from the standpoint of correct application of law, and has, we submit, established that the Board properly affirmed the Commissioner's determination. We further submit, however, that regardless of that phase of the case, the decision of the Board on the record herein may not be disturbed.

The findings of the Commissioner are prima facie correct and the taxpayer who complains of them before the Board of Tax Appeals has the burden of showing that they are wrong. *Wickwire* v. *Reinecke,* 275 U. S. 101; *Am-Plus Storage B. Co.* v. *Commissioner* (C. C. A., 7th), 35 F. (2d) 167; *Botany Mills* v. *United States,* 278 U. S. 282. The taxpayer failed to sustain this burden on the record in the instant case.

Moreover, the taxpayer has not established what in fact was the income resulting from the method which he suggests and its consequent tax liability. His failure to produce competent and persuasive proof upon which an intelligent assessment may be predicated is fatal to his case. *Lucas* v. *Structural Steel Co.,* 281 U. S. 264; *Burnet* v. *Houston,*

283 U. S. 223; *F. G., Inc.,* v. *Commissioner* (C. C. A. 7th), 47 F. (2d) 541; *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359.

III

The proceeding with respect to the year 1922 was properly dismissed by the Board for want of jurisdiction, no deficiency for that year having been determined by the Commissioner

The Board of Tax Appeals was created to review determinations of *deficiency* by the Commissioner of Internal Revenue and afford administrative relief from such determinations in the ordinary type of case before assessment and collection of the additional taxes so proposed. *Oesterlein Machine Co.,* 1 B. T. A. 159. The statutory provisions, particularly Sections 273 (1) and 274 of the Revenue Act of 1926, define those determinations of deficiency which constitute the subject matter over which the review by the Board of Tax Appeals is authorized. Thus in the first instance the jurisdiction of the Board is limited to determinations of a *deficiency* in respect of tax. In turn by Section 273 (1) the term "deficiency" is defined to be:

> The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; * * *.

In the instant case the sixty-day letter from which the petition was filed with the Board of Tax Appeals notified the petitioner of an overassessment for the year 1922 of $671.02. (R. 17, 19.) And the

statement contained in the letter was that "the overassessment shown herein will be made the subject of certificates of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district." (R. 20.) There was in this determination of the Commissioner and notification to the taxpayer no indication of an amount by which "the tax exceeded the amount shown upon the return," but on the contrary a disclosure of an amount by which that shown on the taxpayer's return exceeded the tax properly due. There was therefore no determination of *deficiency,* and the Board of Tax Appeals properly dismissed the proceedings in so far as they purported to relate to the year 1922. *R. P. Hazzard Co.,* 4 B. T. A. 150; *Cornelius Cotton Mills,* 4 B. T. A. 255.

In the brief of the petitioner, computations are indicated in support of the proposition that there was in fact a mathematical error on the return so that the total tax liability shown thereon was overstated in the sum of $1,440. No tax was yet paid by the taxpayer and he urges that this sum had been abated before the representative of the bureau discovered the erroneous deduction resulting in that year from the use of an incorrect basis for computing the income from long-term contracts. We submit, however, that the thing on which a deficiency is predicated is the correct net income of the taxpayer computed according to the statute. It is upon this that the tax imposed by the statute is

computed. Until the latter is ascertained, no "deficiency" can be determined. (See Sec. 273 and 274, Revenue Act of 1926.) It is incumbent upon the Commissioner therefore to stop at nothing short of determining the proper tax on the true net income, and to do this he must take all items which influence the computation of the correct tax into consideration. See *Levy* v. *Commissioner* (C. C. A. 9th), 48 F. (2d) 725; *Lewis* v. *Reynolds* (C. C. A. 10th), 48 F. (2d) 515.

CONCLUSION

In view of the foregoing, it is submitted that the decision of the Board of Tax Appeals should be affirmed.

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